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ALEXANDER L. STEVAS
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**In the
Supreme Court of the United States**

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK, AND
THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE,
a/k/a THE ONEIDA NATION OF NEW YORK, a/k/a THE
ONEIDA INDIANS OF NEW YORK; THE ONEIDA
INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA
TRIBE OF INDIANS OF WISCONSIN, INC.; THE
ONEIDA OF THE THAMES BAND COUNCIL; AND
THE STATE OF NEW YORK,
RESPONDENTS.

THE STATE OF NEW YORK,
PETITIONER,

v.

THE ONEIDA INDIAN NATION OF
NEW YORK STATE, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

**Brief of the County of Oneida, New York, and the County
of Madison, New York, as Petitioners in No. 83-1065.**

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Questions Presented for Review.

1. Whether, assuming that an Indian tribe and the State of New York failed to comply with the Indian Trade and Intercourse Act of 1793 in making a conveyance of land in 1795, the present Indian respondents have a cause of action under federal substantive law against the present occupiers of that land, especially when neither respondents nor petitioners were parties to, or extant at the time of, the conveyance;

2. Whether, in any case, respondents' claims are barred because they were not brought until 175 years after the conveyance;

3. Whether the 1795 conveyance was subsequently ratified by the United States, and is therefore valid and enforceable;

4. Whether respondents' claims present non-justiciable political questions.

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Opinions Below.

The opinion of the District Court finding liability against petitioners the Counties of Madison and Oneida, New York ("the Counties") is reported at 434 F.Supp. 527 (N.D.N.Y. 1977). (Jt.App. at 45a.) The opinions of that court with respect to damages and finding liability against the State of New York ("the State") are both unreported. (Jt.App. at 154a, 188a.) The opinion of the Court of Appeals is reported at 719 F.2d 525 (2d Cir. 1983). (Jt.App. at 207a.) Prior opinions on jurisdictional issues not relevant here are reported at 464 F.2d 916 (2d Cir. 1972) and 414 U.S. 661 (1974). An opinion of the Court of Appeals dismissing an interlocutory appeal is reported at 622 F.2d 624 (2d Cir. 1980).

Jurisdiction.

The judgment of the Court of Appeals was entered on September 29, 1983. The Counties' petition for a writ of certiorari in No. 83-1065 was filed on December 28, 1983. The State's petition in No. 83-1240 was filed on January 25, 1984. This Court granted both petitions on March 19, 1984, and ordered the two cases consolidated. Jurisdiction exists pursuant to 28 U.S.C. § 1254(1).

Statutes and Treaties Involved.

1. "An Act to regulate trade and intercourse with the Indian tribes," Act of July 22, 1790, c. XXXIII, 1 Stat. 137;
2. "An Act to regulate Trade and Intercourse with the Indian Tribes," Act of March 1, 1793, c. XIX, 1 Stat. 329;
3. "An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers," Act of May 19, 1796, c. XXX, 1 Stat. 469;
4. "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," Act of March 3, 1799, c. XLVI, 1 Stat. 743;
5. "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," Act of March 30, 1802, c. XIII, 2 Stat. 139;

6. Title 25, United States Code, Sections 177 and 180;
7. Title 28, United States Code, Section 2415;
8. Treaty of Canandaigua, November 11, 1794, 7 Stat. 44;
9. Treaty of September 15, 1795, between State of New York and Oneida Nation of Indians;
10. Treaty of June 1, 1798, between State of New York and Oneida Nation or Tribe of Indians; and
11. Treaty of June 4, 1802, between State of New York and Oneida Nation or Tribe of Indians.

Because of their length, the statutes and treaties above are set forth in the appendix to this brief.

Statement of the Case.

This is an action to recover damages for the wrongful occupation of 871.92 acres of land in New York State for the years 1968 and 1969. It was explicitly brought as a "test case," and it has served as the jurisdictional and substantive fountainhead for eastern Indian land claims litigation over the last decade. Respondents, the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames Band Council ("the Oneidas"), plaintiffs below, claim to be the "direct descendants" of the original Oneida Indian Nation.¹ The Counties, petitioners in No. 83-1065 and defendants and third-party plaintiffs below, are the record owners of the subject land. The court found the Counties liable to the Oneidas for damages in the amount of \$16,694, plus interest. The State, petitioner in No. 83-1240 and third-party defendant below, was found liable to indemnify the Counties for any damages payable to the Oneidas.

The basis of the liability judgment below was a finding that a 1795 cession transferring a vast tract of then-wilderness land from the Oneida Nation to the State was unlawful. The court

¹ The Counties' designation of the Indian respondents as "the Oneidas" is solely for the convenience of the Court. It is not intended to suggest any unity on the part of those parties. On the contrary, the three Indian respondents and the so-called "Houdenosaunee" are engaged in a bitter internecine dispute as to which is the proper governmental entity to succeed to the Oneida Nation, and to receive the monetary benefits and sovereign rights promised by this lawsuit. See text, *infra*, at 47-48.

ruled that because the transfer was unlawful, it is void; that every subsequent transfer of any land within that tract, including the subject land, is also void; and that therefore the Counties (and, implicitly, all others similarly situated) do not own, and never have owned, any of the subject land.

1. *Jurisdictional Proceedings, 1970-1974.*

The complaint was filed by the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin in the United States District Court for the Northern District of New York on February 5, 1970. (Jt.App. at 4a).² It alleged that the State and the original Oneida Nation entered into a treaty on September 15, 1795, whereby the Oneida Nation transferred approximately 100,000 acres of land to the State in return for a perpetual annuity; that no officer of the United States was present at the execution of that treaty; and that the treaty was not consented to or ratified or approved by the United States. The Oneidas claimed that the treaty therefore violated the "Indian Non-Intercourse Act, 1 Stat. 137," and that the transfer was thus invalid.³ Because the Counties occupied parts of the treaty area for various public improvements, the Oneidas claimed that the Counties were "indebted" to them for the fair rental value of the land for the period of January 1, 1968, through December 31, 1969.

The District Court dismissed the claim for lack of federal question jurisdiction in an unpublished opinion in 1971. The Court of Appeals affirmed. 464 F.2d 916 (2d Cir. 1972). This

² The Oneida of the Thames Band Council intervened as plaintiff during the liability phase of the trial.

³ The statute appearing at 1 Stat. 137 is the first Trade and Intercourse Act, which was enacted in 1790. The actual statute, if any, violated in 1795 was the Trade and Intercourse Act of 1793, 1 Stat. 329; the particular provision of that statute, if any, that was violated was section 8. The 1793 statute, like the 1790 Act which preceded it, was temporary in nature. It was repealed and replaced by a new Trade and Intercourse Act in 1796. Act of May 19, 1796, c. 30, 1 Stat. 469. Expanded and strengthened Trade and Intercourse Acts were in turn enacted in 1799, 1802, and 1834. Act of March 3, 1799, c. 46, 1 Stat. 743; Act of March 30, 1802, c. 13, 2 Stat. 139; Act of June 30, 1834, c. 161, 4 Stat. 729. The last of these acts was codified in its present form in 1874. See 25 U.S.C.A. § 177, note.

Court reversed and remanded, holding that *for jurisdictional purposes* the complaint sufficiently "asserted a current right to possession conferred by federal law, wholly independent of state law." 414 U.S. 661, 666 (1974). This Court did *not* rule on whether federal substantive law actually provided the asserted cause of action; it held only that the claim was not state-law based and was not so frivolous as to preclude federal jurisdiction to decide the substantive questions. 414 U.S. at 675-78.

On remand, the Counties filed third-party complaints seeking indemnity from the State. The District Court then trifurcated the case, trying the issues of the Counties' liability to the Oneidas first, damages second, and reserving the claims against the State for last.

2. *Liability Trial and Judgment, 1974-1977.*

A three-day trial was held on liability, and the District Court issued its findings on July 12, 1977. 434 F.Supp. 527 (N.D.N.Y. 1977). (Jt.App. at 45a.) The court first held that the Oneida Indian Nation of New York constituted a tribe within the meaning of the Trade and Intercourse Acts, and that it and the other plaintiffs were the "direct descendants" of the original Oneida Nation. 434 F.Supp. at 538. (Jt.App. at 63a.) It then found that the land involved was covered by the 1793 Act, as the "aboriginal home land of the Oneidas, later confirmed in treaties with the United States Government. . . ." *Id.* Next, the court held that no United States commissioner was present at Albany at the consummation of the treaty, and it rejected arguments that the United States had subsequently consented to or ratified the transaction. 434 F.Supp. at 538-540. (Jt.App. at 64a-67a.) Finally, it found that the trust relationship between the Oneida Nation and the United States was neither terminated nor abandoned. 434 F.Supp. at 540. (Jt.App. at 68a.) The court held that "[a] prima facie case of violation of the Nonintercourse Act, 25 U.S.C. § 177, has been established," *id.*, and concluded that as a result, the Oneidas' "right of occupancy and possession to the land in question was not alienated." 434 F.Supp. at 548.

(Jt.App. at 84a). Thus, the court stated, "[b]y the deed of 1795, the State acquired no rights against [the Oneidas]; consequently, its successors, the defendant counties, are in no better position." *Id.*

In finding liability against the Counties, the District Court rejected a number of affirmative defenses as a matter of law, including statute of limitations, laches, adverse possession, and bona fide purchaser for value. While it noted at the outset that the "impact of the Oneidas' claim will reach far beyond the boundaries of the present suit," and that "[t]he potential for disruption in the real estate market is obvious and is already being felt," it concluded it had no choice but to enter a finding for the Oneidas despite the "disruption and individual hardships" it would inevitably entail. 434 F.Supp. at 531. (Jt.App. at 47a-48a.)

3. *Post-Trial Motions, 1977-1981.*⁴

During the period from late 1977 through mid-1981, the District Court addressed various motions filed by the Oneidas and the Counties. Most significant for present purposes, the court ruled on two motions for summary judgment by the Counties. First, in May, 1979, it rejected the Counties' contention that the Oneidas' claims were precluded by a 1978 finding of liability against the United States on a claim the Oneidas had previously filed before the Indian Claims Commission. That action included a claim for damages from the United States on the ground that it failed to prevent the 1795 conveyance to New York.⁵

⁴It was at this juncture in the proceedings that the present counsel to the Counties entered the case.

⁵In 1951, the Oneidas instituted proceedings against the United States before the Indian Claims Commission ("ICC") seeking additional compensation for land sold to the State by 27 treaties executed between 1785 and 1846, including the 1795 treaty at issue here. As to the post-1790 claims, including the claim based on the 1795 treaty, the ICC determined that *under the Trade and Intercourse Acts* the United States had an obligation to assure that the Oneidas received conscionable consideration for their lands, and that it would be liable if such consideration was not received. The ICC ordered that questions of value and consideration were to be determined after further proceedings. *Oneida Nation v. United States*, 26 Ind.Cl.Comm. 138 (1971). On appeal, the Court of Claims held that *scienter* on the part of the federal government was a

Second, in May, 1981, the District Court rejected a motion by the Counties questioning its authority to fashion a damages remedy because of the political question doctrine and several then-recent decisions of this Court concerning the appropriate roles of Congress and the federal judiciary in developing remedies. (Jt.App. at 87a, 123a.)

4. *Damages Trial, 1981.*

In October, 1981, the District Court concluded a trial on damages against the Counties. The court found that the Counties occupied 871.92 acres of land in the treaty area, including a park, a fire department radio tower, a gravel bed, and approximately 125 miles of highways and bridges. It specifically found that the Counties did not exist in 1795 (and thus could not have participated in the transaction complained of), that "[n]o evidence has been presented to show that [the Counties] acted other than in good faith," and that none of the present improvements existed in 1795. The court also found that the Oneidas were not excluded from using the subject land; that they had received compensation from the State as a result of the 1795 treaty; and that they had never refused or returned any of that compensation. (Jt.App. at 148a-152a.)

Because of the Counties' good-faith occupation, the District Court assessed the value of the occupied lands as if they were unimproved, thus effectively permitting the Counties to offset

prerequisite to liability, and remanded the action to the ICC for a determination of the government's knowledge, actual or constructive, of 23 treaties between New York and the Oneidas. 477 F.2d 939 (Ct.Cl. 1973).

On remand, the ICC held that the government had constructive notice of all of the treaties, "and probably had actual knowledge of most of them." 43 Ind.Cl.Comm. 373, 375 (1978). The ICC then ordered that the action proceed to a determination of value and consideration with respect to each of the treaties. On September 30, 1978, the ICC was dissolved, and the claim was accordingly transferred to the Court of Claims. Act of Oct. 8, 1976, Pub.L.No. 94-465, 90 Stat. 1990, as amended, Act of July 20, 1977, Pub.L.No. 95-69, 91 Stat. 273.

Shortly thereafter, the District Court in this action certified the issue raised by the Counties' motion under 28 U.S.C. § 1292(b). The Court of Appeals first took the Counties' appeal, but later dismissed it as improvidently accepted because the judgment of the ICC was deemed not final. 622 F.2d 624 (2d Cir. 1980). The Oneidas then voluntarily elected — solely for tactical reasons — to dismiss the entire claim prior to a determination of their damages. See text, *infra*, at 9, n.7.

the value of the improvements. Accordingly, the court awarded \$9,060 damages against Madison County and \$7,634 damages against Oneida County, plus annual interest at 6%, for the fair rental value of the land in the years 1968 and 1969. (Jt.App. at 154a-175a.)

5. *Third-Party Claim Against the State, 1982.*

In May, 1982, the District Court granted the Counties' motion for summary judgment against the State on their third-party complaints. The court's ruling was based on equitable indemnity principles, and was premised on a finding that the State was the actual wrongdoer. The court rejected the State's argument that the claim was barred by the Eleventh Amendment, holding that any such immunity was waived. (Jt.App. at 188a-199a.)

6. *Appellate Proceedings, 1982-1983.*

Final judgment was entered in the District Court on May 11, 1982, and all parties appealed. On September 29, 1983, a sharply divided Court of Appeals affirmed. 719 F.2d at 525. (Jt.App. at 207a.) The majority, composed of Senior Circuit Judges Lumbard and Mansfield, affirmed the finding of liability, rejecting the contentions that the Oneidas did not have a cause of action under federal law, that any such claim abated with the expiration of the 1793 Act, that the claim was time-barred or non-justiciable, and that the United States subsequently ratified the 1795 transaction. 719 F.2d at 530-40. (Jt.App. at 215a-237a.) The majority also affirmed all but two aspects of the judgment as to damages,⁶ and affirmed the judgment against the State. *Id.* at 540-44. (Jt.App. at 237a-248a.)

⁶ Although the District Court had specifically found that the Counties did not exist in 1795 and that no countervailing evidence suggesting bad faith on the part of the Counties had been offered, the majority held that the Counties had the burden of proving their good faith from the date of their creation up to the present time. The majority stated that it was "not prepared" to overturn the lower court's finding of good faith, but remanded for "clarification" of that issue. 719 F.2d at 542. (Jt.App. at 242a.) Such a burden of course, would be virtually impossible to meet as a practical matter. Among other things, the Counties would somehow have to prove affirmatively that unknown individuals, who had been dead for generations, were without knowledge of an alleged illegality that occurred in 1795.

Judge Meskill wrote a vigorous dissent. He first pointed out that the majority was inviting "potentially staggering claims" on what he called "skimpy authority." 719 F.2d at 545. (Jt.App. at 248a.) He then observed that the problem was essentially a political one, which Congress, not the judiciary, should address, and that in any event Congress had established administrative procedures to resolve Indian land claims. Finally, he examined the applicable law and concluded that neither the Trade and Intercourse Act nor federal common law provided the right of action claimed by the Oneidas. 719 F.2d at 545-49. (Jt.App. at 250a-258a.)

Summary of Argument.

1. The Oneidas assert a right of action based upon two sources: an implied right of action under the Trade and Intercourse Act of 1793 and a right of action under federal common law. No right of action should be implied under the 1793 Act under the standards applied by this Court, because the Second Congress could not possibly have intended any such result. No federal common law right of action such as this ever existed on behalf of an Indian tribe, and there is no reason to create one; more importantly, any such exercise of federal judicial lawmaking is clearly preempted by the Trade and Intercourse Acts.

2. The Oneidas waited nearly two centuries before filing their claim. Because no federal statute of limitations applies, the proper course is to borrow and apply as federal law the most nearly analogous statute of limitations of the state in which the court sits. The longest limitation period of any kind in New York is twenty years. Furthermore, the Trade and Intercourse Act of 1793 was a temporary statute; actions and disabilities for violations of the Act were preserved only until 1799, and subsequently abated.

3. The United States, by subsequent treaties in 1798 and 1802, retroactively ratified the 1795 conveyance and thereby gave it full legal effect. In addition, the conduct of the United States after 1795 and the jurisdictional history of the area

clearly show an intent on the part of the federal government to ratify the conveyance.

4. The Oneidas' claim presents solely non-justiciable political questions because: (1) the Constitution expressly commits responsibility for regulating Indian commerce to Congress, and Congress, by the Trade and Intercourse Act of 1793 and the Treaty of Canandaigua of 1794, expressly delegated all remedial authority for wrongful acquisition and occupation of Oneida lands exclusively to the President; and (2) the determination of this claim necessarily entails a political choice among various feuding Oneida factions as to which is the proper entity to be the sovereign government in the area and to receive the money awarded in this lawsuit.

Argument.

The judgment under review in this action is one of the most extraordinary ever entered by an American court. The wrong, if any, occurred nearly two centuries ago. The wronged party, if any, no longer exists, and has not for at least a century and a half. The defendants against whom the judgment was entered did not exist at the time of the wrong, and thus could not possibly have participated in it. This lawsuit thus involves a nearly 200-year-old claim, brought by plaintiffs who were not injured, against defendants who did not commit the wrong.

An even more remarkable aspect of the judgment is the nature of the purported wrong which it seeks to redress. That "wrong" is *not* that the land was stolen from the Oneida Nation; the District Court specifically found that the Oneidas were paid a perpetual annuity for the land, and that they never refused or returned any of the payments. Nor is the "wrong" that the consideration paid was inadequate; although both courts below hinted darkly to that effect, any such evidence was held to be irrelevant to the ultimate finding of liability.⁷ The

⁷The Oneidas were provided with a forum (the Indian Claims Commission) in which to challenge the adequacy of that consideration, but voluntarily dismissed their claim before it proceeded to an award of damages. The dismissal was a tactical judgment by the Oneidas, apparently based upon a concern that a recovery against the United States might preclude them — either as a matter of law or sympathy —

claimed violation of law, rather, is that the 1793 Trade and Intercourse Act was not complied with because *no United States commissioner was present in Albany in 1795 at the signing of the treaty*. The primary historical purpose of the Trade and Intercourse Acts, however, was *not* solicitude for Indians, as helpless wards of the government; it was peace along the Indian frontier and the achievement of orderly westward expansion of white settlements. *See text, infra*, at 21-22. In order to vindicate that legislative purpose, thousands of titles to homes, farms, and businesses in Madison and Oneida counties, representing untold deprivations by generations of faultless persons, would be declared useless scraps of paper.

Perhaps the most extraordinary aspect of the judgment, however — and certainly one contemplated by the Oneidas and the District Court — is that it may compel further judgments of staggering proportions. This judgment itself implicitly holds that thousands of individuals and entities, in an area covering more than 150 square miles in the heart of central New York State, are now “trespassers.” That consequence, however, is but the tip of the iceberg. The Oneida Nation alone executed more than 25 treaties with New York between 1788 and 1846; the Court of Appeals remarked in dictum below that only two of those treaties were made with federal supervision and approval. 719 F.2d at 529. (Jt.App. at 213a.) Indeed, the Oneidas have already filed suit seeking damages and to be “restored” to “immediate possession” of a five to six million acre tract of land in central New York State extending from Pennsylvania to the Canadian border, an area larger than Massachusetts or New Jersey. *See Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982).⁸

from prevailing against present landowners in litigation such as this. *See* 434 F.Supp. at 531, n.9 (Jt. App. at 49a); *United States v. Oneida Nation of New York*, 576 F.2d 870, 872-874 (Ct. Cl. 1978). *Cf. United States v. Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976) (payment of claim under ICC Act held to be evidence of extinguishment of Indian title); *see also Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (ICC constitutes exclusive remedy for claim of unlawful taking of Indian land).

⁸A hearing on various issues in that action is presently scheduled for September, 1984. The Court of Appeals recently ruled in that action that an Indian group styling itself as the “Houdenosaunee,” or the “Six Nations Iroquois Confederacy” should

Furthermore, the Oneidas are by no means unique. As the Court of Appeals also noted, at least one authority has estimated that the “State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government.” 719 F.2d at 529 n.5, quoting F. Cohen, *Handbook of Federal Indian Law*, 420 n.24 (1942 ed.) (hereinafter “Cohen”) (Jt.App. at 213a.) Other New York Indian groups also have filed suits in the District Court,⁹ and similar suits by other Indian groups are pending or threatened in several other eastern and southern states.¹⁰

Thus, in the wake of this Court’s 1974 decision in this case, Indian groups claiming title to millions of acres of private land

be permitted to intervene in order to protect its claim to be the true owner of most of New York west of Albany, including all former Oneida land, and all of the land at issue in this lawsuit. *See Oneida Indian Nation of Wisconsin v. New York*, No. 83-7910, slip op. (2d Cir. Apr. 5, 1984). The “Houdenosaunee” claims that title properly rested in it by authority of the “Great Law of the Houdenosaunee,” or the “Gayanerakowa,” which in turn is said to derive solely from oral tradition. *Id. See text, infra*, at 47.

In addition to that action, two others brought by the Oneidas are presently pending in the District Court. *Oneida Indian Nation v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (action for damages challenging approximately 25 treaties with New York State); *Oneida Indian Nation v. Williams*, 74-CV-167 (N.D.N.Y.) (action for ejectment against twenty-three landowners).

⁹An action seeking the recovery of approximately 70,000 acres filed by two entities claiming to be “direct descendants” of the Cayuga Indian Nation is presently pending in the Northern District of New York, and the complaint in that action expressly promises that a further claim will be brought to recover an additional three million acres. *See Cayuga Indian Nation of New York v. Cuomo*, 565 F.Supp. 1297 (N.D.N.Y. 1983). Other claims have been filed by a group calling itself the Canadian St. Regis Band of Mohawk Indians. *See Canadian St. Regis Band of Mohawk Indians v. New York*, 573 F.Supp. 1530 (N.D.N.Y. 1983).

¹⁰Litigation is presently pending in South Carolina, Massachusetts, Connecticut, and Florida in addition to New York. *See Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983); *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, No. 74-5826-MCN (D.Mass., filed 1974); *Christiantown Tribe v. Clark*, No. 81-3206-S (D.Mass., filed 1981); *Chappaquidick Tribe v. Clark*, No. 81-3207-S (D.Mass., filed 1981); *Herring Pond Tribe v. Clark*, No. 81-3208-S (D.Mass., filed 1981); *Troy Tribe v. Clark*, No. 81-3209-S (D.Mass., filed 1981); *Mohegan Tribe v. Connecticut*, 528 F.Supp. 1359 (D.Conn. 1982); *Schaghticoke Tribe v. Kent School Corp.*, 423 F.Supp. 780 (D.Conn. 1976); *Seminole Tribe of Indians of Florida v. Florida*, No. 78-6116-CIV-NCR (S.D.Fla., filed 1978).

The Indian Claims Limitation Act of 1982, Pub. L. 97-394, 96 Stat. 1976, required the Secretary of the Interior to publish in the Federal Register “a list of all claims accruing to any tribe, band or group of Indians or individual Indian on or

have flocked into federal courts. In response, the courts have blithely entertained centuries-old claims based upon everything from federal common law and implied rights of action under the early Trade and Intercourse Acts to the Articles of Confederation and "oral tradition." For the reasons set forth below, the Counties ask this Court to check what has become an unrestrained exercise of judicial lawmaking on a truly extraordinary scale.

I. THE ONEIDAS DO NOT HAVE A CAUSE OF ACTION AGAINST THE COUNTIES UNDER FEDERAL LAW.

The Oneidas assert a right of action based upon two sources: an implied right of action under the Trade and Intercourse Act of 1793, and a right of action under federal common law. This Court did not reach the issue of whether such rights are available in its 1974 decision on jurisdiction. 414 U.S. at 675-78.

A. The Oneidas Do Not Have an Implied Right of Action under the Trade and Intercourse Acts.

The Court has formulated its approach for analyzing claims for implied rights of action in various ways since first announcing it in *Cort v. Ash*, 422 U.S. 66 (1975). It is clear, however, that "[i]n evaluating such a claim, [the] focus must be on the intent of Congress when it enacted the statute in question." *Daily Income Fund, Inc. v. Fox*, 104 S.Ct. 831, 839, 78

before July 18, 1966," which had been identified or submitted to the Secretary, for statute of limitations and various other purposes.

Pursuant to that statute, twenty-one separate claims were listed in the "Eastern Area" as "Aboriginal Land Claims" or "Nonintercourse Act Land Claims." The groups listed included the Catawba; St. Regis; Oneida; Cayuga; Gay Head Band of Wampanoag; Western Pequot; Schaghticoke; Mohegan; Shinnecock; Seminole; Chitimacha; Tunica Biloxi; Stockbridge Munsee; Houma; Eastern Pequot; Alabama-Coushatta Tribe of Texas; and the Tigua Tribe of El Paso, Texas. 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983); 48 Fed. Reg. 51204, 51252 (Nov. 7, 1983). The land involved was not named, but presumably includes lands in Massachusetts, Connecticut, New York, Wisconsin, South Carolina, Florida, Mississippi, Louisiana, and Texas.

L.Ed.2d 645, 655 (1984). The factors which are to be examined to discern that intent include: the statutory framework and language; the legislative history and purpose of the statute; the existence of express statutory remedies adequate to serve the legislative purpose; the identity of the class for whose particular benefit the statute was passed; and the traditional role of the states in affording the relief claimed. *Id.*; *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16 (1979).¹¹

1. Statutory Framework and Language.

"We look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra*, 453 U.S. at 13. Because the statute, if any, violated by the 1795 conveyance was the 1793 Act, it is on that statute that the inquiry must focus. *Touche, Ross & Co. v. Redington*, 442 U.S. 560, 562 n.2, 568-69 (1979). *See also Daily Income Fund, Inc. v. Fox*, *supra*, 104 S.Ct. at 839, 78 L.Ed.2d at 655 ("our focus must be on the intent of Congress when it enacted the statute in question"). Section 8, the land sales section of the 1793 Act, provided:

no purchase or grant of lands . . . from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians for the title or purchase of any lands by them held or claimed.

¹¹That analytic framework applies irrespective of the age of the statute. *See, e.g., California v. Sierra Club*, 451 U.S. 287 (1981) (1899 statute); *id.*, 451 U.S. at 298 (Stevens, J., concurring).

No right of action by a tribe is mentioned anywhere in the Act.

As its language indicates, § 8 is a *criminal* provision, which provides two criminal penalties (fines and imprisonment) for its violation. This Court "has rarely implied a private right of action under a criminal statute, and where it has done so, 'there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979), quoting *Cort v. Ash*, *supra*, 422 U.S. at 79. See also *Nixon v. Fitzgerald*, 457 U.S. 731, 754 n.37 (1982) (victims of statutory crimes generally have no right to sue).

No such statutory basis exists here. While § 10 of the 1793 Act vested jurisdiction in the federal courts "to hear and determine all crimes, offences and misdemeanors against this Act," that section by its terms provided only *criminal*, and not civil, jurisdiction. This case is thus markedly different than *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), where the requisite "statutory basis" for inferring civil liability under § 14(a) of the Exchange Act was provided by § 27, which "specifically granted jurisdiction to the district courts over civil actions to enforce any liability or duty" created. *Cort v. Ash*, *supra*, 422 U.S. at 78 n.11.

In *Transamerica Mortgage Advisors, Inc. v. Lewis*, *supra*, this Court specifically rejected an implied civil damages remedy under a statutory provision analogous to the one at issue here. There, § 215 of the Investment Advisers Act of 1940 provided that contracts whose formation or performance would violate the Act would be "void." 444 U.S. at 16-17. The Court held that a buyer of investment advisory services had an implied right of action for rescission and restitution, but that *no* "other private causes of action, legal or equitable," including any which "could provide by indirection the equivalent of a private damages remedy," could be implied. *Id.* at 24 & n.14.¹² Thus,

¹² Even the "limited" equitable remedy implied under the language of § 215 of the IAA could not be implied under the 1793 Trade and Intercourse Act. First, the 1793 Act did not declare that conveyances made in violation of its terms would be void, but only of "no validity in law or equity" — in other words, not legally enforceable. 1793 Act, § 8. The section therefore simply imposed a disability,

even if the conclusion of the courts below that the 1795 conveyance was void is followed, it is plain that no private right of action for damages may be implied under § 8 of the 1793 Act.¹³

The other enforcement and relief provisions of the 1793 Act are also instructive concerning Congress' intent. As in *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra*, 453 U.S. at 13-15, Congress expressly established a wide variety of enforcement and relief mechanisms in the 1793

which was removed by Congress in 1799. See text, *infra*, at 35-37. Furthermore, the Court in *Transamerica* expressly noted that "[j]urisdiction of such suits would exist under § 214 [citation omitted], which, though referring in terms only to 'suits in equity to enjoin any violation,' would equally sustain actions where simple declaratory relief or rescission is sought." 444 U.S. at 19 & n.9. The 1793 Act, as noted, provided *only* criminal jurisdiction, not civil or equitable jurisdiction. *Id.*, § 10.

¹³ The Court of Appeals' analysis of the 1793 Act conflicts with both historical and modern constructions of such statutes. The antecedent of § 8 of the 1793 Act was § 4 of the 1790 Act, which simply provided:

And be it enacted and *declared*, that no sale of lands made by any Indians, or nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

(Emphasis added). Section 8 of the 1793 Act, however, was not merely a "declarative law," see text, *infra* at 17-18, 28-29, but instead conformed more nearly to the structural paradigm of the day, containing "declaratory," "directory" and "sanction" components. See 1 BLACKSTONE COMMENTARIES (1st ed.) 53-57. According to this paradigm, the "no validity" clause was the "declaratory" part of § 8 and provided no remedy. See *id.* at 54-56. This construction is consistent with this Court's construction of similar language in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 (1982) (under § 8(e) of National Labor Relations Act, declaring certain labor contracts to be "unfair labor practice" and "unenforceable and void," only NLRB may provide affirmative remedies, although a court may not enforce a contract provision which violates the statute).

Violation of the "directory" part of a statute gave rise to the statutory remedy; the "directory" part of § 8 prohibited "directly or indirectly" negotiating treaties with Indians. See 1 BLACKSTONE COMMENTARIES (1st ed.) 56. Since the Counties did not even exist at the time of the 1795 treaty, they could not have violated § 8. Thus, the Counties (and the Oneidas) presumably could "enforce" the 1795 conveyance. See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386-87 (1970) (statute declaring contracts in violation "void" "establishes that the guilty party is precluded from enforcing the contract against an unwilling innocent party, but it does not compel the conclusion that the contract is a nullity, creating no enforceable rights even in a party innocent of the violation") (footnote omitted).

Act. These included forfeitures,¹⁴ criminal penalties,¹⁵ permit suspensions or revocations,¹⁶ and an early precursor of the citizen's suit, the informant's suit provisions.¹⁷ Section 5 is particularly deserving of attention, for it specifically addressed "settlement[s] on lands belonging to any Indian tribe." It made any person making such a settlement liable for fines and imprisonment and authorized "the President of the United States . . . to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make . . . a settlement thereon." In other words, Congress intended a two-pronged scheme for regulating encroachments on Indian lands: (a) those persons "directly or indirectly" negotiating conveyances without federal authority were subject to criminal penalties, and (b) those actually occupying Indian land were subject to criminal penalties and to removal by the President in the exercise of his discretion.

While § 5 directly addressed the occupancy of Indian land, § 6 expressly provided a remedy against certain remote purchasers of Indian property: those who knowingly purchased

¹⁴ Section 3 required persons caught attempting to trade with the Indians, or found in Indian country without a license, to forfeit all the merchandise in their possession, and provided that such persons could be fined or imprisoned.

¹⁵ Section 4 provided that citizens or inhabitants of the United States who committed crimes in Indian territory against friendly Indians would be punished in the same manner as if the crime had been committed in the state to which the citizens belonged. Section 5 provided that "if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe . . . he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months," and gave the President the power to remove unlawful settlers. Section 11 authorized the President and the territorial governors "to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law."

¹⁶ Section 1 required persons trading with the Indian tribes to be licensed by the federal government and required a thousand dollar bond conditioned on the observance of government regulations on trade with the Indian tribes. Section 2 authorized recall of the license if the licensee failed to abide by the regulations.

¹⁷ Section 12 provided that "all fines and forfeitures . . . shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use." Section 6 contained a similar provision applying to persons knowingly purchasing horses illegally brought out of Indian territory.

Indian horses obtained without a federal license. Thus, when Congress wanted to provide a remedy against unlawful occupiers of Indian land or against remote purchasers of Indian property obtained without the requisite federal sanction, "it knew how to do so and did so expressly." *Touche, Ross & Co. v. Redington*, *supra*, 442 U.S. at 572.

"In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the [statute]." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, *supra*, 453 U.S. at 14; *accord*, *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93-94, 97 (1981) ("The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies," and such a scheme creates a strong presumption that the omission of any particular remedy was deliberate); *Transamerica Mortgage Advisors, Inc. v. Lewis*, *supra*, 444 U.S. at 19, ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.") Because Congress set forth specific remedies as part of a comprehensive legislative scheme, no further remedies should be implied.

2. Legislative History and Statutory Purpose.

a. Legislative History.

The legislative history of the 1793 Act plainly demonstrates that Congress enacted criminal and military remedies, and no others, because it thought those remedies were the only available and effective means to preserve peace with the frontier tribes.

The initial version of the Trade and Intercourse Act, enacted in 1790, essentially followed the recommendations of Secretary of War Henry Knox. Knox had urged Congress, in a report dated July 17, 1789, to enact a "declarative law" recognizing the right of the Indians to possess their lands, subject only to divestment by the United States. 1 *American State Papers*:

Indian Affairs 52-54 (1832). The land sales provision of the 1790 Act, § 4, was just such a law. Alone among the 1790 Act's substantive provisions, it began with the words "be it enacted *and declared*" and contained no remedial provisions.

Those charged with administering the 1790 Act, however, soon found it wanting, because it did not contain adequate means of enforcement. In his Third Annual Address, delivered in 1791, President Washington urged Congress "that efficacious provision should be made for inflicting adequate penalties upon all those who, by violating [Indians'] rights, shall infringe the treaties, and endanger the peace of the Union." 1 *American State Papers: Foreign Relations* 16 (1832). In a speech to Congress in 1792, the President renewed his plea: "I cannot dismiss the subject of Indian affairs, without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier. . . ." Speech of President Washington, November 6, 1792, 1 *American State Papers: Foreign Relations* 19 (1832).

In response to the President's urging, Congress enacted a new Trade and Intercourse Act on March 1, 1793. Violation of the land sales provision was made a criminal offense, subject to a fine not exceeding \$1,000 and up to 12 months' imprisonment. 1793 Act, § 8. Furthermore, the Act authorized the President "to take such measures, as he may judge necessary, to remove" violators, and it included an informants' suits provision to support the collection of the newly authorized criminal fines. *Id.*, §§ 5, 12. No right of action such as the Oneidas assert here was *ever* mentioned in the 1793 Act, as proposed or as enacted.

The legislative history of the subsequently-enacted Trade and Intercourse Acts strengthens the conclusion that Congress deliberately chose only certain particular remedies. As urged by Washington and Knox, § 5 of the 1796 Act expanded the President's power to remove illegal settlers by expressly au-

thorizing the use of military force. See 1 *American State Papers: Indian Affairs*, 472, 543-544 (1832); 1796 Act, § 5. Section 5 was further amended to provide that any person convicted of illegally settling on Indian land shall "forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid." Upon such forfeiture, the "right, title or claim forfeited" did not revert to the original Indian owner, but vested in *the United States*.

The new forfeiture clause sparked vigorous debate in the House of Representatives. See generally *Annals of Congress: The Debates and Proceedings in the Congress of the United States*, 4th Cong., 1st Sess., December 7, 1795 — June 1, 1796 ("Annals"), April 9, 1796, at 893-904. Proponents of the forfeiture clause argued that the previous version of § 5 in the 1793 Act had proved ineffectual in preventing illegal occupation of Indian land. Remarks of Rep. Crabb, *Annals* at 897; see also remarks of Rep. Hillhouse, *id.* at 898. Opponents of the clause argued on the basis of the proposition, accepted by proponents and opponents alike, that only "superior military force" would prevent whites from taking possession of Indian land. Compare remarks of Rep. Gallatin, *Annals* at 902-04 ("Was it supposed that if these persons were not deterred by the present law, which inflicts a penalty of one thousand dollars and imprisonment of one year, that they would be deterred by the present [*sic*] law? No such thing. They will say, 'if the Government are not strong enough to prevent us from going upon the land, they will not be able to drive us from it'") with remarks of Rep. Hillhouse, *Annals* at 899. Rep. Gallatin went on to argue that "*as to any legal restraints the present provisions by law were sufficient, or, if the fines were not large enough, they might be made larger.*" *id.* at 904 (emphasis added). Rep. Nichols argued that the forfeiture clause would constitute an inflexible penalty which would prevent the exercise of Presidential discretion to take into account mitigating circumstances. *Id.* at 896. No one ever suggested in the course of the debate that a private right of action by a tribe was an available remedy.

The forfeiture provision was ultimately eliminated when Congress passed the 1802 Trade and Intercourse Act. *See* Act of March 30, 1802, *supra*, § 5. Although there is no available legislative history explaining its deletion from the 1802 Act, the debates prior to its original passage in 1796 indicate that Congress was clearly troubled by the forfeiture remedy. Abandonment of the remedy suggests that Congress intended to rely solely upon criminal prosecutions to punish, and discretionary political and military powers to dispossess, those illegally occupying Indian land. *Cf. Daily Income Fund, Inc. v. Fox, supra*, 104 S.Ct. at 840-41, 78 L.Ed.2d at 656-58 (ultimate deletion of proposal expressly authorizing investment company to enforce statute itself "strongly suggests that . . . Congress did not intend to create an implied right of action in favor of the investment company").¹⁸

¹⁸ The Court of Appeals stated that the "only [remnant] of legislative history available" is a speech by President Washington to the Senecas in December, 1790, in which he stated "[i]f . . . you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." The court's view was that Washington thought the 1790 and 1793 Acts permitted Indians to bring private causes of action. 719 F.2d at 536 n.15. (Jt.App. at 229a.)

The intent of Congress, of course, not the President, is controlling in determining whether a private right of action should exist. *See American Trucking Ass'ns v. A.T. & S.F. Ry.*, 387 U.S. 397, 417-18 (1967). In any event, if President Washington actually believed that a private right of action could be brought by a tribe in federal court in 1790, he was very much mistaken, as tribes were then denied access to federal courts on jurisdictional grounds. The Judiciary Act of 1789 provided for diversity jurisdiction and jurisdiction over actions involving foreign nations, but Indian tribes were then neither "citizens" nor "foreign nations" within the meaning of that statute. *See Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974); *Karrahoo v. Adams*, 14 F.Cas. 134 (C.C.D. Kan. 1870). According to Chief Justice Marshall,

At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them from among the parties who might sue in the courts of the union.

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831).

The Congress that drafted the Trade and Intercourse Acts of 1790 and 1793, of course, included many of the same "statesmen." Federal question jurisdiction, excepting a brief period in 1801, was not introduced until 1875, and the jurisdictional statute for actions brought by Indian tribes was not enacted until 1966. *See* *Sofel v.*

b. Statutory Purpose.

The preeminent purpose of the Trade and Intercourse Acts was to preserve peace on the Indian frontier, while effecting the orderly removal of tribes in favor of the advancing whites. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978) (purpose of 1790 Act "to prevent destructive retaliations by the Indians," quoting Seventh Annual Address of President Washington); *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981) ("it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions"). *See generally* R. Lerner, *Reds and Whites: Rights and Wrongs*, 1971 Sup. Ct. Rev. 201. *Cf. Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979) ("Because of recurring trespass upon and illegal occupancy of Indian territory a major purpose of these Acts *as they developed* was to protect the rights of Indians to their properties") (emphasis added). According to the leading scholarly authority on the Trade and Intercourse Acts:

The goal of American statesmen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature — aimed largely at restraining the actions of the whites and providing justice to the Indians *as the means of preventing hostility*.

Thompson, 415 U.S. 452, 464 & n.14 (1974); Act of Oct. 10, 1966, Pub. L. 89-635, 80 Stat. 880. Furthermore, it was widely assumed until at least the late 19th or early 20th century that Indian tribes lacked legal capacity to sue in federal courts absent statutory authority. *See Jaeger v. United States*, 27 Ct. Cl. 278, 285 (1892) ("Whenever [tribes] have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors"); R. Clinton & M. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: the Origins of the Eastern Land Claims*, ("Clinton & Hotopp"), 31 Me.L.Rev. 17, 46-48 (1979). Indeed, as late as 1942 the leading authority on Indian law stated that the question of whether a tribe could maintain an action independent of statutory authority was one as to which "judgment must be reserved." Cohen, *supra*, at 285. Whether that view was correct is unimportant, as long as it was the prevailing legal view in 1793. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Curran*, 456 U.S. 353, 378 n.61 (1982).

F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834* (1962) at 3 (hereinafter "Prucha") (emphasis added).

The view of the Court of Appeals that the 1793 Congress was concerned only for the welfare of helpless tribes simply cannot be supported. As that court itself observed in *Mohegan Tribe v. Connecticut*, *supra*:

The evidence suggests that federal Indian policy was based upon the need to prevent Indian uprisings. . . . [T]he evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them, and . . . quite readily demonstrates that contemporary attitudes have colored our views of the original motives behind American Indian policy. . . .

638 F.2d at 621-22.

Moreover, even if it were assumed that protection of Indian tribes and peace on the frontier were dual purposes of the Act, that assumption would work *against*, not in favor of, an implied right of action. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64 (1978), this Court held that "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other." Inference of a private judicial remedy would have *disserved* the 1793 Act's goal of enabling the President to preserve peace on the frontiers; it would have transferred the government's sensitive peace-keeping function from the executive to the judiciary, which had neither the authority, the power, nor the expertise to maintain the peace, and it would have transferred the enforcement process from executive discretion to private adversarial litigation. As James Madison said when he introduced the 1793 Act's land sales provision:

[M]isunderstandings, quarrels, and wars with the Indians, had originated from the circumstance of persons having obtained, through fraud, or other improper means, posses-

sion of lands belonging to the Indians. This consideration rendered it highly important *that this whole business should be under the absolute and sole direction of the public authority.* . . .

1791-1793 *Annals of the Congress of the United States* (J. Gales ed., 1793) 827-28 (emphasis added).

3. Adequacy of Express Remedies to Serve the Legislative Purpose.

The 1793 Act contained numerous express remedies. Unauthorized conveyances and occupation of Indian land were made crimes, and informants were empowered and encouraged to institute prosecutions if the United States failed to do so. If, nonetheless, some party induced an unlawful conveyance, that party was disabled from enforcing it. If, nonetheless, some party occupied Indian land, the President could remove him. As a matter of historical fact, it was to *these* remedies, *not* to the courts, that the Indians themselves actually made recourse. See *Prucha, supra*, at 150-51, 158-66. And, it was *these* remedies that held out the only real hope for mitigating unlawful settlements and intrusions on Indian lands. See *id.* at 143-44, 183-87.

It is surely no accident that Congress enacted a wide range of remedial measures *without* providing a private ejectment remedy to Indian tribes.

It is inconceivable that Congress intended to keep sales of Indian land under tight public control, yet leave redress of illegal sales to uncontrolled private enforcement. Rather than provide for private litigation — between militantly hostile parties of radically differing cultures — Congress chose to grant an ejectment-like remedy to the President, who could exercise it, in his discretion, in a controlled and deliberate manner.¹⁹ The express remedies provided by Congress were adequate to further the legislative purpose of maintaining peace, and should not be added to by this Court.

¹⁹ It is noteworthy that in *Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1856) (a trespass action brought in state court by an individual Indian), the Court ruled

4. Identity of the Class for Whose Particular Benefit the Statute was Passed.

Because its chief purpose was the preservation of peace, "the legislative history supports the view that the Act was designed to benefit the public at large," *not* Indians as a particular class. *California v. Sierra Club, supra*, 451 U.S. at 294-95. Moreover, even if Indians were "undoubtedly" within such a class, the Act's express provisions ensure that their rights under the statute can be vindicated by parties acting on their behalf, making implication of further rights unnecessary. See *Daily Income Fund, Inc. v. Fox, supra*, 104 S.Ct. at 841, 78 L.Ed.2d at 659.

5. Traditional Role of the States.

State law provided remedies to Indians throughout the nineteenth century. See, e.g., *Seneca Nation v. Christy*, 162 U.S. 283 (1896); New York law in particular protected the Oneidas and their lands from pre-constitutional times. See generally *Goodell v. Jackson*, 20 Johns. 693 (N.Y. 1823). Thus, this factor, too, weighs against imputing to Congress an intent to provide the asserted implied right of action.

In summary, the evidence is overwhelming that the Second Congress did not intend to provide a private right of action to Indian tribes under the Trade and Intercourse Act of 1793.

that even where the Indians had ceded title to their lands, both forcible removal and actions in ejectment were impermissible remedies:

It is difficult to believe that it could have been intended by the Government that [the Indians] were to be left, after they had parted with their title to their homes, to be expelled by the irregular force and violence of the individuals who had acquired it, *or through the intervention of the courts of justice*. As we have seen, the Seneca Nation upon the four reservations consisted of a population of some two thousand six hundred and thirty-three souls; and if we include the Tuscaroras, whose lands were also purchased under the same treaty, nearly three thousand. *It is obvious that any such litigation would be appalling.*

Id., 60 U.S. at 371 (emphasis added).

B. The Oneidas Do Not Have a Cause of Action under Federal Common Law.

As the concurring opinion in this Court's 1974 decision in this action noted,

the complaint in this action is basically one in ejectment. Plaintiffs are out of possession; the defendants are in possession, allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession.

414 U.S. at 683. The Oneidas do *not* seek ejectment under state common law, but as a matter of *federal* common law.

It is beyond dispute that the Oneida Nation had no right in 1795 to bring an action such as this under federal common law.²⁰ Indeed, as the dissent below pointed out, "[n]o case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law." 719 F.2d at 545. (Jt.App. at 250a.)²¹ Any federal common law right of action on behalf of the Oneidas must therefore be created out of whole cloth. Since *Erie R. v. Tompkins*, 304 U.S. 64 (1938), however, the creation of federal common law has been resorted to only as a "necessary expedient" in a "few and restricted" instances." *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981). There is no extraordinary expediency here demanding the creation of such a right.

²⁰ No federal common law of any kind existed prior to 1842. As early as 1797, the Court expressly looked only to state common law, see *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 356 (1797), and in *Sims' Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 457 (1799), the court specifically looked to state common law concerning ejectment. In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) (the year the last Trade and Intercourse Act was passed) the Court stated flatly that there was no federal common law. Even under the regime established by *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842), state law governed "rights and titles to things having a permanent locality, such as rights and titles to real estate."

²¹ The Court of Appeals below relied upon *Marsh v. Brooks*, 49 U.S. (8 How.) 223 (1850) for the proposition that such a common law right has long been available. 719 F.2d at 530. (Jt. App. at 216a). While the *Marsh* court observed that the right to maintain "an action of ejectment . . . on an Indian right to occupancy and use, is not open to question," 49 U.S. at 232, that case was a state law action brought in state court by a non-Indian. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), cited in *Marsh*, was a diversity action involving a title dispute between non-Indians and was decided at a time when there was no federal common law.

First, Congress has already enacted appropriate remedies for the wrong complained of by the Oneidas, thereby eliminating the need for further judicial lawmaking. As this Court noted in *Nixon v. Fitzgerald*, 457 U.S. 731 (1982):

The dissent cites *Marbury* [v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)] for the proposition that "[t]he very essence of civil liberty consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.*, at 163. Yet *Marbury* does not establish that the individual's protection must come in the form of a particular remedy. *Marbury*, it should be remembered, *lost* his case in the Supreme Court. The Court turned him away with the suggestion that he should have gone elsewhere with his claim.

457 U.S. at 754 n.37 (emphasis in original).

The Oneidas *were* provided with other remedies, and indeed they went "elsewhere" with their claims. Congress established the Indian Claims Commission as one such remedy; the Oneidas won a finding of liability against the United States in that forum, but chose not to reap its benefits. *See text, supra*, at nn. 5 & 9. Congress also established a procedure for the Oneidas to take their claims to the Executive under the Treaty of Canandaigua of 1794; the Oneidas did so, and the Executive declared their Indian Claims Commission remedy adequate. *See text, infra*, at 45-46. Finally, in the 1793 Trade and Intercourse Act itself, Congress empowered *the President* to remove unlawful occupiers of Indian lands, and to seek criminal penalties. *See text, supra*, at 18. In this context, federal common law is wholly unnecessary to vindicate any rights created by the 1793 Act.

A further reason for judicial forbearance was suggested by the Court in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981). There, the Court refused to create a federal common law right of contribution in antitrust, stating:

The choice we are urged to make is a matter of high policy for resolution within the legislative process after

the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.

451 U.S. at 646-47, quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980). *Accord, Northwest Airlines, Inc. v. Transport Workers Union, supra*, 451 U.S. at 95-98.

The necessary implication of the judgment below is that the Oneidas (or rather some as-yet-unknown faction of Oneidas) will be "reestablished" as the sovereign government over a large tract in the heart of New York State. At a minimum, and notwithstanding existing jurisdictional statutes, that government will have broad regulatory powers superior to and independent of those of state and local governments. *Cf.* 25 U.S.C. §§ 232, 233 and *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310, 312-13 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) and cases cited therein. Such a "reestablishment" of a sovereign Indian government after 200 years of state and private control and development is, to say the least, "a matter of high policy" which "involves the balancing of competing values and interests" and a range of factors which dwarfs the complexity of the issue presented in *Texas Industries*.

Of far greater significance, moreover, is the fact that the enactment of the Trade and Intercourse Acts preempted any federal common law right of action. The starting point for the preemption analysis is this Court's opinion in *City of Milwaukee v. Illinois, supra* ("*Milwaukee II*").

Milwaukee II stated three fundamental principles of constitutional jurisprudence. First, "[f]ederal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision." 451 U.S. at 312. Second, "[t]he enactment of a federal

rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress." 451 U.S. at 312-13. Third, "[f]ederal common law is a 'necessary expedient,' . . . and when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." 451 U.S. at 314. The Court went on to explain that, accordingly, the relevant inquiry is "whether the legislative scheme 'spoke directly to a question' . . . not whether Congress had affirmatively proscribed the use of federal common law." 451 U.S. at 315. "[W]hen the question is whether federal statutory or federal common law governs, . . . 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." 451 U.S. at 316-17.

Milwaukee II held that the federal common law of nuisance in the area of water pollution was preempted by the enactment of the Federal Water Pollution Control Act ("FWPCA"). The Court first found that Congress intended, in enacting the 1972 amendments to FWPCA, to establish an all-encompassing program of regulation. 451 U.S. at 318. Second, those amendments established statutory controls on the very acts Illinois sought to abate under federal common law, and "[f]ederal courts lack authority to impose more stringent . . . limitations under federal common law than those imposed by the agency charged by Congress with administering this comprehensive scheme." 451 U.S. at 320. Finally, the 1972 amendments provided a forum in which the interest of Illinois could be protected, which had not been provided under the prior law. 451 U.S. at 325-26. *Accord, Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, supra*, 453 U.S. at 22.

The similarities between the *Milwaukee* cases and the present case are compelling. The first Trade and Intercourse Act, enacted in 1790, contained only six sections. Its land sales provision was merely declaratory, it provided no forum for

protecting federal or tribal interests, and it contained no remedies for violations. Dissatisfied with these deficiencies, President Washington urged Congress to adopt a more comprehensive statute, including the infliction of penalties for violation of the statute. *See text, supra*, at 18. Congress responded with the 1793 Trade and Intercourse Act.

The 1793 Act was far more comprehensive than the 1790 Act, particularly with respect to Indian lands. The land sales provision was made enforceable by the addition of criminal penalties for the illegal negotiation of the purchase of any Indian land. 1793 Act, § 8. The new act also provided criminal fines and imprisonment for unlawful settlements and authorized the President to take such measures as he might deem necessary to remove unlawful settlers. *Id.*, § 5. A general informants' suit provision was included to support the collection of the newly authorized fines. *Id.*, § 12. In addition, the 1793 Act added lengthy sections dealing with horse thieves and horse traders (§ 6); prohibiting various employees in Indian affairs from having an interest or concern in trade with the Indians (§ 7); providing for the furnishing of certain goods and services to tribes (§ 9); and providing that Indians "living on lands surrounded by settlements of the citizens of the United States" would not be subject to trade restrictions (§ 13).

Thus, like the 1972 amendments to the FWPCA at issue in *Milwaukee II*, the 1793 Act (a) established a comprehensive program for the regulation of Indian trade and intercourse, including the disposition of Indian lands; (b) established criminal and administrative limitations and controls (including ejectment-like remedies) on the very acts for which the Oneidas seek relief; and (c) provided for the institution of suit in a federal forum to enforce the controls and sanctions of the Act.

The Court of Appeals, in rejecting the Counties' preemption argument, remarked that "[t]he Trade and Intercourse Acts were not comprehensive statutes." 719 F.2d at 531. (Jt. App. at 218a.) As the dissent correctly pointed out, however, the court was selectively applying contemporary standards to divine the intent of the Second Congress, sitting in 1793. The Trade and Intercourse Acts, in fact, provided comprehensive

criminal and administrative controls and mechanisms that were unusually elaborate for the late eighteenth century. Even in the past decade, this Court has held far less imposing enactments to preempt the creation of federal common law. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), the Court held that the Death on the High Seas Act, 46 U.S.C. §§ 761-768, an eight-section statute, preempted creation of federal common law in admiralty. In *Northwest Airlines, Inc. v. Transport Workers Union*, *supra*, 451 U.S. at 77, the Court held that the Equal Pay Act of 1963, one subsection of the Fair Labor Standards Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, a 17-section statute, preempted the creation of federal common law.²²

When such a comprehensive statutory scheme is enacted, federal courts are not free to supplement it: "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham*, *supra*, 436 U.S. at 625.²³ In any case, the 1793 Act expressly "spoke directly" to the very question raised here — the remedies for unlawful occupation of Indian land — and those remedial provisions are "detailed and specific." See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, *supra*, 451 U.S. at 644. The 1793 Act has therefore preempted whatever common law right of action may otherwise have existed, and precludes any need for the extraordinary exercise of judicial lawmaking.

²²The Court of Appeals also held that congressional intent to preempt federal common law in the area of Indian property rights must be "plain and unambiguous," citing *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339 (1941). 719 F.2d at 531-32. (Jt. App. at 219a.) That decision has nothing whatsoever to do with congressional preemption, and is therefore clearly inapposite. There is no reason, in any event, why congressional intent to preempt in the area of Indian law should be held to a stricter standard than that prevailing in other areas of strong federal concern, such as admiralty, environmental protection, or civil rights. See *Mobil Oil Corp. v. Higginbotham*, *supra*; *Milwaukee II*, *supra*; *Northwest Airlines, Inc. v. Transport Workers*, *supra*.

²³If Congress desires to preserve a common law remedy in an area covered by a statutory scheme, it may do so expressly. See, e.g., *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976) (construing 49 U.S.C. § 1506: "Nothing contained in this chapter shall in any way abridge or alter remedies now existing at common law . . . but the provisions of this chapter are in addition to such remedies.").

II. THE ONEIDAS' CLAIM SHOULD BE BARRED BECAUSE IT WAS NOT BROUGHT UNTIL 175 YEARS AFTER THE CONVEYANCE AT ISSUE.

A. The Claim is Barred by the Applicable Statute of Limitations.

The wrong, if any, which this lawsuit purports to vindicate occurred on September 15, 1795. This nation was then a struggling aggregation of former colonies, clustered on the edge of a vast wilderness populated chiefly by hostile and warring Indian tribes.

The complaint was filed on February 5, 1970, nearly 175 years later. The land that had once been virgin forest is now located in the developed heart of one of the most populous states in the union. Generations of innocent persons, relying upon the justifiable belief that they held good title, have invested their savings and labor into the land, and have built homes, farms, and businesses upon it. The Court of Appeals, however, brushed away the Counties' temporal defenses in two cursory paragraphs, without even addressing the gross unfairness of permitting such a result.

First, the court held that the Oneidas could not be subject to state law limitations periods borrowed under federal law, because (a) doing so would permit a violation of the 1793 Act to go unremedied, and (b) the United States as trustee for a tribe would not be subject to state delay-based defenses, and it would be "anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribe themselves." 719 F.2d at 538. (Jt.App. at 232a.) The court then observed that the statute which governs suits by the United States on behalf of Indian tribes, 28 U.S.C. § 2415, provided "some guidance"; it concluded that because the Oneidas' claim would not be barred under the statute if brought by the United States, it should not be barred when brought by the Oneidas themselves. 719 F.2d at 538. (Jt.App. at 232a-233a.)²⁴

²⁴The Court of Appeals thus held, in essence, that a cause of action which accrued in 1795, and which was time-barred under New York law for years, was controlled by a statute originally enacted by Congress in 1966. Act of July

The court's opinion is based entirely on the belief that Indian tribes and the United States *must* be treated *exactly* alike for statute of limitations purposes. That view, however, is directly contrary to the intent of Congress in enacting 28 U.S.C. § 2415, and is without a sound basis in law and policy.

First, 28 U.S.C. § 2415, as its language and legislative history plainly indicate, was most definitely *never* intended by Congress to apply to suits brought by tribes themselves. That statute applies only to actions

... for money damages brought by the United States or an officer or agency thereof . . . for or on behalf of a recognized tribe, band or group of American Indians. . . .

28 U.S.C. § 2415(b) (emphasis added). Nowhere does the statute mention an action brought by a tribe itself.

The legislative history of Section 2415 clearly demonstrates that it was not intended to apply to tribes. At hearings in 1972 and 1977 on proposed extensions of the time period set forth in the statute, officials of both the United States and state governments testified that the statute could not possibly apply to suits brought by tribes themselves. *See, e.g.,* remarks of William A. Gershuny, Associate Solicitor for Indian Matters, Dept. of the Interior, *Time Extension for Commencing Actions on Behalf of Indians: Hearing on S. 3377 and H.R. 13825 before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 92nd Cong. 2d Sess., 23 (September 12, 1972); remarks of Joseph E. Brennan, Attorney General of Maine, *Statute of Limitations Extension for Indian Claims: Hearings before the U.S. Senate Select Comm. on Indian Affairs on S. 1377*, 95th Cong., 2d Sess., 76-77 (May 3 and 16, 1977). During the debate on the 1977 bill, Rep. Cohen of

18, 1966, Pub. L. 89-505, 80 Stat. 304. Once a statute of limitations as to an action to recover property expires, any attempt to revive the action "falls nothing short of an attempt arbitrarily to take property from one having perfect title and to subject it to an extinguished claim of another" in violation of due process of law. *Stewart v. Keyes*, 295 U.S. 403, 417 (1935) (act of Congress removing bar of state statute of limitations in actions to recover allotted Indian lands held unconstitutional).

Maine stated flatly that "I would like to point out what this bill does not do . . . [I]t does not pertain to claims brought by tribes themselves. The only thing this bill pertains to are suits brought by the Justice Department on behalf of Indian tribes for money damages only." *Cong. Rec.*, v. 123, p. 22166 (July 11, 1977). This view was echoed by an opponent of the bill as well. *Id.* at 22168 (remarks of Mr. Dicks).²⁵

It is therefore plain that Congress intended that the United States and Indian tribes be treated differently for statute of limitations purposes. There is, furthermore, nothing "anomalous" about that disparity of treatment. It is inherent in the guardian-ward relationship that the guardian possesses certain rights and powers which the ward cannot exercise. In addition, the United States has significantly different concerns than an Indian tribe; for example, the United States has an obligation to consider the interests of all parties, including the well-founded expectations of innocent non-Indian landowners. Thus, the United States declined to prosecute this action on behalf of the Oneidas *in favor of another federal remedy*, the Indian Claims Commission, that was far less disruptive and imposed no hardship on blameless persons. *See text, infra* at 46.

The so-called "anomaly" at issue here is a regular feature of Indian law. For example, in *United States v. Minnesota*, 270 U.S. 181 (1926), where this Court defined the sovereign interest of the United States in suits to recover Indian lands, the Court acknowledged that the United States was able to sue in that case while its Indian wards could not. The Court pointed

²⁵See also *Cong. Rec.* v. 123, p. 22499 (July 12, 1977) (remarks of Mr. Cohen); p. 22500 (remarks of Mr. Foley); p. 22507 (remarks of Mr. Dicks); p. 22509 (remarks of Mr. Studds); p. 22510 (remarks of Mr. Yates) (both proponents and opponents of a separate proposed amendment agreed that nothing in § 2415 would affect actions brought by Indian tribes themselves for trespass damages); *Statute of Limitations Extension: Hearing Before the U.S. Senate Select Committee on Indian Affairs*, 96th Cong., 1st Sess., 11 (December 17, 1979) (remarks of Mr. Walker); *Cong. Rec.*, v. 126, p. S1641 (February 20, 1980) (remarks of Sen. Melcher); p. S1642 (remarks of Sen. Cohen) (again, both proponents and opponents of the bill agreed that it would have no effect on suits brought by Indian tribes on their own behalf.) Similar debate occurred in the House of Representatives. *Cong. Rec.*, v. 126, p. H1943 (March 18, 1980) (remarks of Mr. Clausen); *Cong. Rec.* v. 126, p. H1945 (March 18, 1980) (remarks of Mr. Marlenee and Mr. Danielson).

to this disparity of rights and status *as a reason for permitting the United States to sue*. 270 U.S. at 195.²⁶

In actuality, no federal statute of limitations applies to this claim. In such a case, it is well-settled that the proper course is for the court to adopt — as a matter of federal law — the most nearly analogous state statute of limitations for the state in which the court sits. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946). State limitations statutes will not be borrowed *only* “if their application would be inconsistent with the underlying policies of the federal statute.” *Occidental Life Ins. Co. v. Equal Employment Opportunity Comm’n*, 432 U.S. 355, 367 (1977).²⁷

“[A] state statute [of limitations] cannot be considered ‘inconsistent’ with federal law merely because the statute causes the plaintiff to lose the litigation.” *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980), quoting *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978). Nor is the application of state law “inconsistent” with federal Indian policy simply because it is created by the states and not the federal government. See *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-74 (1979) (state law of avulsion and accretion applied to determine title to Indian land); *Board of Comm’rs v. United States*, 308 U.S. 343, 351-52 (1939) (state law of interest applied in action involving taxation of Indian land). For this Court to rule that a New York statute of limitations bars a 175-year-old claim — when Congress has expressly declined to enact a controlling federal statute — would not be inconsistent with federal Indian policy in the slightest respect, for that policy may still be

²⁶The purported “anomaly” at issue also occurs in other fields of law. For example, private federal securities law plaintiffs are routinely subjected to borrowed state statutes of limitation, while the SEC is not. See, e.g., *Securities & Exchange Comm’n v. Penn Central Co.*, 425 F.Supp. 593, 599 (E.D. Pa. 1976).

²⁷The Court of Appeals offered two reasons why the application of New York law would be “inconsistent”: the so-called anomaly of treating the United States and an Indian tribe differently, discussed above, and the fact that it “would permit a violation of the 1793 Act to go unremedied.” 719 F.2d at 538. (Jt. App. at 232a.) The latter proposition is absurd on its face. The application of *any* statute of limitations to bar *any* valid claim necessarily leaves a wrong unremedied.

vindicated by the United States under *United States v. Minnesota, supra*. Furthermore, it would further a strong federal policy favoring repose.²⁸

The most analogous New York statute is N.Y.Civ.Prac.Law § 212, which creates a ten-year limitations period on actions for the recovery of real property. In any event, the longest New York statute of limitations for *any* cause of action is twenty years. N.Y.Civ.Prac.Law § 211. The Oneidas’ cause of action therefore expired long ago.

B. All Actions and Disabilities under the Trade and Intercourse Act of 1793 have Abated.

The Trade and Intercourse Act of 1793 was *not* an amendment to the 1790 Act. It was a *new* statute, which expressly repealed “all and every other act and acts coming within [its] purview.” 1793 Act, § 14. Furthermore, it was a *temporary* enactment; it specifically provided that it would only “be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.” *Id.*, § 15.

On May 19, 1796, Congress repealed the 1793 Act, and enacted a new Trade and Intercourse Act. 1796 Act, § 21. The repealer section of the 1796 Act contained the following savings clause:

²⁸As this Court noted in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944):

Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

That principle is particularly important where titles to real estate are involved. See *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78 (1831); see also *Felix v. Patrick*, 145 U.S. 317, 335 (1892) (failure to dismiss claim involving Indian land “would result in the unsettlement of large numbers of titles upon which the owners have rested in assured security for nearly a generation.”). Its application to this case is emphasized by the Court of Appeals’ holding that the *Counties* must prove good faith occupation all the way back to 1795.

Provided, nevertheless, that all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the [repealed act or acts]; in the same manner, as if the said act or acts were continued, and in full force and virtue.

Id. The 1796 Act, too, was a temporary statute by its express terms. *Id.*, § 22. On March 3, 1799, Congress repealed the 1796 Act, and again enacted a new — and temporary — Trade and Intercourse Act. 1799 Act, § 21. The repealer section of the 1799 Act contained a similar savings clause. *Id.*

Thus, the Trade and Intercourse Act of 1793 was only a temporary statute, and it was specifically repealed in 1796. Prior to 1871, at common law, when a statute creating either criminal or civil penalties expired or was repealed, all actions commenced under it which had not proceeded to final judgment immediately abated unless the repealing statute provided for the continuation of such suits. *See, e.g., Hamm v. City of Rock Hill*, 379 U.S. 306, 322-23 (1964) (Harlan, J., dissenting); *Gulf, Colorado & Santa Fe Ry. v. Dennis*, 224 U.S. 503, 506 (1912); *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 95 (1870); *Norris v. Crocker*, 54 U.S. (13 How.) 429, 440 (1851), and cases cited therein.²⁹

The Court of Appeals held that, because the several Trade and Intercourse Acts contained similar language, the 1793 statute should be treated as “essentially in force.” 719 F.2d at 537. (Jt. App. at 231a.) In so ruling, the court flatly disregarded the pre-1871 abatement doctrine, which calls for a precisely opposite result. Furthermore, the court erroneously applied general rules

²⁹ Congress specifically reversed the common law abatement doctrine by statute in 1871. Act of February 25, 1871, 16 Stat. 432, now codified at 1 U.S.C. § 109. *See Warden v. Marrero*, 417 U.S. 653, 660 (1974). Because that statute operated only prospectively, however, it could not revive an action under the 1793 Trade and Intercourse Act that had already abated in 1799.

of statutory construction — designed to ascertain unclear legislative intent — in the face of an *express* statement by Congress that the prior statutes were repealed, with certain limited and *express* exceptions.³⁰

1. *Implied Right of Action under the 1793 Act.*

The implied right of action claimed by the Oneidas is analogous to the right asserted in *Norris v. Crocker*, *supra*, 54 U.S. at 429. There, the owner of a fugitive slave brought a civil action for an alleged violation of the Fugitive Slave Act of 1793, which provided a private right of action against persons knowingly hindering the recovery of a fugitive slave. While the suit was pending below, however, Congress enacted a new statute, the Fugitive Slave Act of 1850. The Court first held that the 1850 act repealed the 1793 act by implication. It then held that “[a]s the plaintiff’s right to recover depended entirely on the [1793] statute, its repeal deprived the court of jurisdiction” to hear the claim. 54 U.S. at 440. Thus, like *Norris*, this action involves a claimed civil cause of action for a violation of a repealed statute, and accordingly this action has abated.³¹

³⁰ The authority cited by the Court of Appeals is not to the contrary. In *Great Northern Ry. v. United States*, 155 F. 945, 953 (8th Cir. 1907), *aff’d*, 208 U.S. 452 (1908) the successor act only repealed “[a]ll laws and parts of laws in conflict with the provisions of this act . . .” (emphasis added). The Eighth Circuit found that this repeal provision expressed “the extent to which it was intended to repeal prior laws, and exclude[d] any implication of a more extended repeal.” *Id.* In the present case, both the repeal and the savings provisions expressly cover the rights claimed by the Oneidas. Furthermore, *Great Northern* post-dates the reversal of the common-law abatement doctrine in 1871. *See text, supra*, at n.29.

³¹ *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1864) does not command a different result. There, the Court held that a pilot’s statutory right to one-half his pilotage fee in certain cases was not affected by the repeal and reenactment of the statute creating the right. The Court held that the right involved was a *quasi-contractual right* which the legislature did not intend to impair by repeal. 69 U.S. at 457-58. The present case, however, is one in which the plaintiffs are seeking to assert a remedy based on provisions of a penal statute which imposes disabilities. *See United States v. Mack*, 73 F.2d 265, 266 (2d Cir. 1934) (explaining *Joliffe*), *rev’d on other grounds*, 295 U.S. 480 (1935). Rather than creating a contractual right, the Trade and Intercourse Act actually limits such rights.

Under the abatement doctrine, Congress may expressly preserve rights arising under repealed statutes. See *Gulf, Colorado & Santa Fe Ry. v. Dennis*, *supra*, 224 U.S. at 506. Congress, however, chose not to do so: section 21 of the 1796 Act preserved only those "prosecutions and suits . . . that may have been commenced" under the 1793 Act. This action, of course, was not commenced until 1970, and thus was not preserved by Congress.

2. Federal Common Law Right of Action.

The Oneidas' common law claim is likewise extinguished by the abatement rule. That claim is grounded in the conclusion of the courts below that the 1793 Act provided that any conveyance made in violation of its provisions would be void *ab initio*. In fact, however, § 8 of the 1793 Act merely declared that such conveyances would be of no "validity in law or equity" — in other words, they would not be legally enforceable. At common law, where a statute did not render contracts violating it void, but simply removed all remedy for their enforcement, the contracts became enforceable after the repeal of the prohibitory statute. See, e.g., *Ewell v. Daggs*, 108 U.S. 143, 151 (1882); *Hewitt v. Wilcox*, 42 Mass. 154 (1840).

Moreover, the loss of the right to enforce a contract is a classic legal "disability." See *Doe v. Webster*, 606 F.2d 1226, 1233-34 (D.C. Cir. 1979); *Black's Law Dictionary* 415 (5th ed. 1974). The 1796 Act's repealer clause preserved only those "disabilities" which had "taken place" under the 1793 Act. 1796 Act, § 21. The 1799 Act, in turn, preserved only those disabilities which had taken place under the 1796 act, without preserving any others. 1799 Act, § 21.³² Thus, any disability that may have arisen under the 1793 Act had long since abated by the time this action was filed in 1970, making the 1795 conveyance fully enforceable.³³

³² The 1802 Act contained no savings provisions whatsoever, and thus conclusively extinguished whatever rights or disabilities might have existed under the former statutes. See 1802 Act, § 22.

³³ This construction is consistent with the federal government's policy at the time — "it readily acquiesced in illegal settlements when they had gone so far as to be irremediable," Prucha, *supra*, at 186 — and explains the government's

III. THE UNITED STATES SUBSEQUENTLY RATIFIED THE 1795 CONVEYANCE TO NEW YORK.

The United States may subsequently ratify, and thereby validate, transfers of land which might otherwise be invalid under the Trade and Intercourse Acts. *Seneca Nation v. United States*, 173 Ct.Cl. 912 (1965); *United States v. National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944); *Seneca Nation v. Christy*, 126 N.Y. 122, 146-47, 27 N.E. 275, 282 (1891), writ of error dismissed on other grounds, 162 U.S. 283 (1896). See also 25 U.S.C. §§ 1712, 1723, 1744 (express retroactive ratification of Rhode Island, Maine, and Florida Indian land transfers).

Indeed, the United States may even subsequently ratify trespasses to Indian lands. *Shoshone Tribe v. United States*, 299 U.S. 476 (1937) (unauthorized occupancy by the Arapahoe Indians of part of the Shoshone reservation); *United States v. Northern Paiute Nation*, 490 F.2d 954, 958 (Ct. Cl. 1974) (trespasses of miners onto Indian land). In *Shoshone Tribe*, the Court stated:

Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy [by the Arapahoes] of the [Shoshone] Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the *de facto* appropriation by relation as of the date of its beginning.

299 U.S. at 495.

The analysis for determining Congressional intent to ratify has two parts: first, the proper legal standard to be applied, and second, whether Congress intended such a ratification to occur.

longstanding refusal to upset sales in Eastern states which violated the first four, temporary Trade and Intercourse Acts. See *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 623 (2d Cir. 1980), cert. denied, 452 U.S. 968 (1981).

A. Federal Ratification of Indian Land Conveyances Need Not be "Plain and Unambiguous," But May be Implied.

It is well-settled that ratification may be implied from the subsequent acts and conduct of the federal government. In *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), this Court rejected the contention that a taking of Indian land by the New York State Power Authority "without the express and specific consent of Congress" violated 25 U.S.C. § 177, holding that Congressional consent could be inferred from the general terms of the Federal Power Act. 362 U.S. at 119, 123. Similarly, in *Seneca Nation v. United States*, 173 Ct. Cl. 912, 915 (1965), the court held that a statute enacted by Congress almost seventy years after a transfer of Indian lands, which did not specifically approve the transfer in question, satisfied the requirements of the Trade and Intercourse Acts: "[t]his explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress's approval of the original appropriation [of the land]." In *United States v. National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944), an action brought by the United States on behalf of an Indian band to void two leases on reservation land, allegedly held by the defendant in violation of 25 U.S.C. § 177, the court found federal consent even without explicit congressional ratification.³⁴

³⁴ As Judge Augustus Hand explained in *National Gypsum*:

For many years it has been the *understanding* of the Department of the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the Comptroller in trust empowered the State to provide for leases of reservation lands and that leases of such lands have been made under a comprehensive plan set up under State authority and warranted by the terms of the original treaty with the Tonawandas. It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C.A. § 177, R.S. § 2116.

141 F.2d at 863 (emphasis added).

The Court of Appeals, relying upon *United States v. Santa Fe Pacific R.R.*, 314 U.S. 339 (1941), held that Congressional ratification of a treaty extinguishing Indian title must be "plain and unambiguous." 719 F.2d at 539 (Jt.App. at 236a.) In *Santa Fe Pacific*, however, the Court construed the executive creation of a reservation for the Walapai Indians and an acceptance thereof by the tribe as an implied release of tribal rights in lands outside the reservation. 314 U.S. at 358. In other words, as explained in *Seneca Nation v. United States*, *supra*, 173 Ct.Cl. at 915, there need only be explicit recognition by the federal government of the transaction in issue in a manner that reveals the implicit approval thereof.

In summary, ratification need not be explicit to be effective. When it is not explicit, the intent of the government is controlling. See *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977). That intent is to be determined from (a) the operative language of the statute or treaty, (b) legislative history, (c) the surrounding circumstances, and (d) the historical exercise of state or tribal jurisdiction over the territory. See *id.*, 430 U.S. at 587; *DeCoteau v. District County Court*, 420 U.S. 425, 442-46 (1975). If an examination of those factors indicates an intent to recognize the termination of Indian title, not even general presumptions favoring Indian tribes will dictate a contrary result. See *DeCoteau v. District County Court*, *supra*, 420 U.S. at 444.³⁵

B. The 1795 Conveyance Was Impliedly Ratified by the United States.

Less than three years after the 1795 conveyance, on June 1, 1798, the Oneida Nation and New York entered into a further treaty for the cession of land. Joseph Hopkinson, a United States commissioner, was present at the signing. (Jt. App. at 36a.) That treaty provided in part:

³⁵ In *Solem v. Bartlett*, 104 S.Ct. 1161, 1167, 79 L.Ed. 2d 443, 450-51 (1984), the Court stated that explicit language of cession by Congress was not required to diminish the boundaries of a reservation, but that circumstantial evidence, including "Congress' own treatment of the affected areas" would be considered in deciphering congressional intent.

... [T]he said [Oneida] Indians do cede release and quit claim to the people of the State of New York forever all the lands within their reservation to the westward and southwestward of a line from the northeastern corner of lot No. 54 in the last purchase from them running northerly to a button wood tree . . . standing on the bank of the Oneida lake[.]

(*Id.*) (emphasis added). The "last purchase from them," clearly refers to the 1795 conveyance. Congress specifically ratified the 1798 treaty on February 13, 1799. 1 *Journal of the Executive Proceedings of the Senate* ("Journal") 312 (1828 ed.).

Three years later, on June 4, 1802, the Oneida Nation and the United States entered into another treaty. John Tayler was present as a United States agent. (Jt. App. at 38a.) The 1802 treaty provided in part that the Oneidas ceded:

... All that certain tract of land beginning at the southwest corner of the land lying along the Genesee Road, and which was ceded in the year one thousand seven hundred and ninety-eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned tract easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of last mentioned tract, to other lands heretofore ceded by the said Oneida Nation of Indians to the People of the State of New York then along the same westerly to a part of said last mentioned land, called the Two-mile strip and thence along the same, northerly to the place of beginning[.]

(Jt. App. at 38a-39a.) (emphasis added). As shown on Plaintiff's Exhibit No. 7 at trial (Jt. App. at 41a), the "other lands heretofore ceded" were lands covered by the 1795 treaty. The Treaty of 1802, like its 1798 predecessor, was specifically ratified by Congress, on December 31, 1802. 1 *Journal*, *supra*, at 428.³⁶

³⁶ Both treaties also make references to lots 54 and 59, each of which are part of the 1795 purchase according to the Surveyor General's plans of 1796. (Jt. App. at 142a-143a.)

The references to the 1795 transaction as a "purchase" and as covering "ceded" lands constitute explicit evidence that the federal government deemed that transaction effective to pass valid title. Had the government wished to convey a contrary message, or even a neutral position, it could easily have done so; for example, it could have identified the 1795 treaty by title without characterizing it (a standard conveyancing practice) or it could have repeated the 1795 metes and bounds descriptions for purposes of description. It did not do so, but rather chose to refer descriptively to the 1795 transfer as a "purchase" and a "cession."

In this regard, it is important to note that the United States did not have merely constructive notice of the 1795 purchase. The District Court specifically found that both Timothy Pickering, the Secretary of War, and Israel Chapin, Jr., the Superintendent of the Affairs of the Six Nations, were aware of the State's dealings with the Oneida Nation in 1795 and had tried on numerous occasions to prevent the tribe from conveying its land. 434 F.Supp. at 535. (Jt. App. at 56a-57a.) Against this background, it is very unlikely that the government's subsequent reference to the 1795 transaction as a "purchase" and a "cession" was casual, and that it did not intend to adopt the common legal meaning of those terms. *Cf. Solem v. Bartlett*, *supra*, 104 S.Ct. at 1166, 79 L.Ed.2d at 450 ("explicit reference to cession . . . strongly suggests" divestment of reservation lands).³⁷

In addition, if the 1795 Treaty were not valid, Congress must be found to have sanctioned purchases of nonsensically circumscribed tracts of land. For example, the easternmost tract covered by the 1798 treaty was, at the time, abutted only by land covered by the 1795 Treaty. (Jt. App. at 41a.) If the latter treaty were invalid, that tract would be floating, unattached, in a sea of Oneida territory. Because "checkerboard jurisdiction" may create serious burdens for state and local governments, constructions leading to such a result are not favored. *See Solem v. Bartlett*, *supra*, 104 S.Ct. at 1167 n.12, 79 L.Ed.2d at 451 n.12.

³⁷ This construction is also consistent with the government's policy of acquiescing in illegal settlements once they had become irremediable. *See text, supra*, at 38, n.33.

The jurisdictional history and other circumstances surrounding the territory in question are also relevant. *See id.*, 104 S.Ct. at 1167, 79 L.Ed.2d at 451. New York has been exercising jurisdiction in an open and notorious manner over the subject land for nearly two centuries. This is not an isolated strip of land or a miscellaneous lot on the edge of a reservation; it is a large tract of land, crisscrossed by major highways and populated by thousands of persons. The treaty area is traversed by federally aided and designated highways, such as Interstate 90 and U.S. 20, and it contains federal post offices employing federal personnel. Neither the Department of the Interior, the Bureau of Indian Affairs, nor any other agency or department of the United States has ever considered the land to be Indian country. Rather, the United States government has treated the land as non-Indian land, fully subject to its jurisdiction and that of New York, for generations. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603-05 (1976) (fact that neither Congress nor BIA sought to exercise authority, or challenge state's exercise of authority, over land that was more than 90% non-Indian is factor entitled to weight in determining congressional intent); *Northwestern Band of Shoshone Indians v. United States*, 324 U.S. 335, 346 (1945) (administration of territory by the United States "as though no Indian land titles were involved" was evidence that Congress did not intend to recognize Indian title).³⁸

In summary, the acts and conduct of the United States subsequent to the 1795 conveyance show a clear intent to ratify that conveyance and to treat it as a valid purchase.

³⁸ *See also United States v. Gemmill*, 535 F.2d 1145, 1148-49 (9th Cir.), cert. denied, 429 U.S. 982 (1976) (inclusion of land in national forest reserve indicated congressional intent to extinguish Indian title); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1391-92 (Ct.Cl. 1975) (inclusion of land in national forest reserve and grazing district constituted extinguishment of Indian title); *Nooksack Tribe v. United States*, 162 Ct.Cl. 712, 715 (1963), cert. denied, 375 U.S. 993 (1964) (treatment as public land indicated congressional intent to extinguish Indian title). The court in *Gemmill* also held that "any ambiguity about extinguishment that may have remained after the establishment of the forest reserves . . . has been decisively resolved by congressional payment of compensation [under the Indian Claims Commission Act]." 535 F.2d at 1149. The Oneidas, as noted, voluntarily refused such compensation in order to attempt to gain a tactical advantage in this lawsuit. *See text, supra*, at n.7.

IV. THE ONEIDAS' CLAIM PRESENTS SOLELY NON-JUSTICIABLE POLITICAL QUESTIONS.

Perhaps the only point of agreement among the parties and the courts below is that this problem would be more properly addressed by Congress or the executive branch.³⁹ The Court of Appeals, however, rejected the contention that the claim presented a non-justiciable political question, treating it instead as if it were a commonplace land dispute between private parties. 719 F.2d at 538-39. (Jt.App. at 233a-235a.)

Under the principles set forth in *Baker v. Carr*, 369 U.S. 186 (1962), a political question is presented if, *inter alia*, there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or "an unusual need for unquestioning adherence to a political decision already made." *Id.* at 217. Both of these "analytical threads" catch this case. *Cf. id.* at 211.

A. *Determination of the Lawfulness of and Remedy for the Counties' Occupancy Has Been Committed Under the Constitution to Congress, which Has Expressly Delegated Sole Authority for that Determination to the President.*

The Constitution explicitly commits responsibility for the regulation of Indian affairs to Congress. U.S. Const. art. I, § 8. Congress, by treaty and by statute, has delegated *exclusive* civil remedial authority with respect to the unlawful occupancy of Oneida lands to the President. Thus, although the Trade and Intercourse Act of 1793 created judicial remedies, it created only criminal penalties. All other remedies, if any, were committed to Presidential discretion:

And it shall, moreover, be lawful for the President . . . to take such measures, as he may judge necessary, to re-

³⁹ *See, e.g.*, 434 F.Supp. at 531-32 (Jt.App. at 48a-50a), and the brief in opposition to the petition for certiorari in No. 83-1065 submitted by the New York and Wisconsin Oneidas, at 20-23.

move from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

1793 Act, § 5. Cf. 25 U.S.C. § 180 (the present-day analogue of § 5).

Article VII of the 1794 Treaty of Canandaigua contains an even broader delegation of remedial authority:

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side . . . *complaint shall be made . . . [b]y the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature . . . of the United States shall make other equitable provision for the purpose.*

(emphasis added).

Thus Congress, pursuant to its constitutional authority, delegated the remedial authority for unlawful occupancy to the President. Congress "might, if [it] had deemed it most advisable to do so, have placed it in the power of a court to decide" when remedial measures were necessary, but it did not. *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849). Furthermore, when Congress delegates discretionary power to the President, the President is the "sole and exclusive judge" of the existence of the facts which call that discretion into play. *Id.* at 45.

The Oneidas presented their case at least twice to the President before filing this litigation; the President and his "Superintendent" made a considered decision to limit "government action on these claims" to the Indian Claims Commission, where the Oneidas had "a claim currently pending . . . for the very injuries . . . complained of." (Jt.App. at 42a-44a.) The judiciary is without the constitutional power to order further remedial measures.

B. *There Is an Unusual Need to Adhere to the Decision of the Political Branches to Remit the Oneidas to the Indian Claims Commission for Their Remedy.*

Both political branches have made a decision regarding the proper disposition of any claim by the Oneidas: Congress determined to delegate remedial power to presidential discretion, and the Executive determined that the claim should properly be resolved before the Indian Claims Commission. The disruption and chaos which this lawsuit promises is reason enough to adhere to that decision, but there is an additional reason why such adherence is necessary.

The Oneida Nation, as noted, has not existed for at least a century and a half. At present, a number of factions — at least two Oneida groups in New York, as well as Oneida groups in Wisconsin and Ontario and the so-called "Houdenosaunee" — are bitterly feuding as to which is the proper entity to succeed to the property rights of the Oneida Nation.⁴⁰ The Oneida factions are so intractably divided that the Department of the Interior has been unable to recognize a tribal governing body for years. See *Oneida Indian Nation of New York v. New York*, 520 F.Supp. 1278, 1285 n.6 (N.D.N.Y. 1981), *rev'd in part on other grounds*, 691 F.2d 1070 (2d Cir. 1982).⁴¹

⁴⁰ Although respondents the Oneida of the Thames Band Council have represented to the courts below and to this Court in *this* case that *they* own the land in question, they are presently asserting in a related case pending below that the so-called "Houdenosaunee" own it. According to the Thames Oneidas in that action, title to the land in 1795 actually resided in the "Houdenosaunee," rather than in any individual tribe, under the "Great Law of the Houdenosaunee" or the "Gayanerakowa." See *Oneida Indian Nation of Wisconsin v. New York*, No. 83-7910, slip op. (2d Cir. April 5, 1984). In other words, the Thames Oneidas maintain that Indian law, *not* the law of the United States, controls the question of which entity has title to and sovereignty over the subject land. It is well-settled, however, that any dispute which depends upon an interpretation of Indian law for its resolution is not justiciable in the courts of the United States. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978).

Even if the "Six Nation Iroquois Confederacy" actually exists, there is some dispute as to whether the "Houdenosaunee" group properly represents it. See *Six Nations Confederacy v. Andrus*, 610 F.2d 996 (D.C.Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) (rival Six Nations groups disputing Indian Claims Commission award).

⁴¹ One faction of the New York Oneidas has filed suit against the Secretary of the Interior in an attempt to force the government to recognize it as the true tribal entity. *Oneida Indian Nation of New York v. Clark*, No. 79-CV-652 (N.D.N.Y., filed Oct. 5, 1979).

The District Court recognized that, because of the conflicting claims of the various Oneida factions, it would be necessary to determine "the rights of the individual plaintiffs to share in a recovery . . . *another day*." 434 F.Supp. at 538 n.20 (emphasis added). (Jt.App. at 63a.) The court, however, could no more resolve that issue today than it could in 1977. The court cannot choose which entity is the proper tribal representative in the absence of recognition by the political branches, nor may it determine the distribution and allocation of tribal property. See *Baker v. Carr*, *supra*, 369 U.S. at 215; *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977).⁴² Neither Congress nor the Executive has resolved those questions. Thus, this case presents an extraordinary situation: although liability has been found, and damages have been assessed, neither the plaintiffs, the defendants, nor the court can determine who is to recover.

The payment of the damages in this action, moreover, is but the beginning. If the decision below is to be given any credence, the land at issue is properly Indian land, subject to the sovereign authority of a tribe. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982). The Counties do not merely "occupy" the roads, park, radio tower, and gravel bed at issue here; they maintain and operate them for the public benefit. Those facilities, and others such as hospitals, schools, and government offices, will now apparently come under the ownership and regulatory control of a different sovereignty. The "reestablishment" of a sovereign government after 200 years would be wrenching enough in the best of circumstances; here, however, no one even knows *which* sovereign government should be chosen. Thus, the effect of the decision below is to transfer the sovereignty of a large tract of land in the middle of New York State into limbo pending the outcome of a political decision committed solely to the coordinate branches.

A final judgment in this action, in the absence of a decision from the political branches on the tribal governance issues

⁴² Even if the judiciary did elect to recognize one or more of the feuding Oneida factions, such an action might involve the "potentiality of embarrassment from multifarious pronouncements by various departments on one question," *Baker v. Carr*, *supra*, 369 U.S. at 217, as the Department of the Interior could well elect to recognize another.

presented herein, would lead to nothing short of chaos. Accordingly, there is an unusual need for adherence to the political decision of Congress and the President to remit this claim to the Indian Claims Commission.

* * *

The overall context of the problem presented by this case deserves emphasis. It is difficult to believe that the court below genuinely expected that thousands of innocent persons would be forced to relinquish their homes and businesses as a result of its ruling; indeed, it is hard to imagine that any rational judicial system would permit the ultimate consequences of this judgment, and the further judgments it promises, to come to pass. The judgment entered below, therefore, likely never was intended to do justice standing by itself, but was designed to achieve some other goal.

The courts below, undoubtedly conscious of their proper role, made only guarded references to the likely real purpose. The Oneidas, however, have been quite candid: the *sole* purpose of the litigation, as they freely acknowledge, is *to prod Congress into legislating a settlement*. See, Brief of Oneida Indian Nation of Wisconsin and Oneida Indian Nation of New York in Opposition to Petitions for Certiorari, pp. 20-23. In other words, the federal courts have been drawn into a game of judicial brinksmanship, designed to provide the maximum possible leverage to the Oneidas in order to extract the most lucrative possible recovery.

Congress, however, has already legislated remedies for the Oneidas for the illegal occupancy of their lands. In effect, the landowners of Madison and Oneida Counties are being held hostage until Congress treats this problem in a manner that is more acceptable to the court than the manner in which Congress has chosen to treat it thus far. While federal courts are frequently called upon to deliver opinions that may have political implications, it is surely improper to engage a court in thinly-disguised political maneuverings for the sole purpose of attempting to exert pressure on Congress.

The motives of the courts were no doubt well-intentioned. Sympathy for the Oneida Nation of 1795, however, is not a proper basis for justice today and particularly not when so many innocent persons have so much at stake. See *Dennison*

v. Topeka Chambers Ind. Dev. Corp., 527 F.Supp. 611, 626 (D. Kan. 1981), *aff'd*, 724 F.2d 869 (10th Cir. 1984). As Chief Judge Urbom observed in *United States v. Consolidated Wounded Knee Cases*, 389 F.Supp. 235 (D.Neb. and S.D. 1975), *aff'd*, 538 F.2d 770 (8th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977):

What precisely do we do now? Shall we pretend that history never was? . . . Feeling what *was* wrong does not describe what *is* right. Anguish about yesterday does not alone make wise answers for tomorrow. Somehow, all the achings of the soul must coalesce and with the wisdom of the mind develop a single national policy for governmental action.

I feel no shirking of duty in saying that formulation of such a national policy should not be made by a federal judge or the handful who may review his decision on appeal.

389 F.Supp. at 238-239 (emphasis in original).

It is obvious — even to the Oneidas — that if any wrong has been committed here, the people of the United States as a whole are the proper source of redress. The Counties submit that it is improper, and unfair, to use the innocent landowners of Madison and Oneida Counties to force such a result.

Conclusion.

The judgment of the Court of Appeals, insofar as it affirmed the District Court's finding of liability against the Counties, should be reversed.

Respectfully submitted,

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June 15, 1984.

Addendum.

TRADE AND INTERCOURSE ACT OF 1790.

An Act to regulate trade and intercourse with the Indian tribes.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose; which superintendent, or other person so appointed, shall, on application, issue such license to any proper person, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, payable to the President of the United States for the time being, for the use of the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as now are, or hereafter shall be made for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons by them licensed as aforesaid, shall be governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe. And no other person shall be permitted to carry on any trade or intercourse with the Indians without such license as aforesaid. No license shall be granted for a longer term than two years. Provided nevertheless, That the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper.

Sec. 2. And be it further enacted, That the superintendent, or person issuing such license, shall have full power and authority to recall all such licenses as he may have issued, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds as he may have taken, immediately on the breach of any condition

in said bond: Provided always, That if it shall appear on trial, that the person from whom such license shall have been recalled, has not offended against any of the provisions of this act, or the regulations prescribed for the trade and intercourse with the Indian tribes, he shall be entitled to receive a new license.

Sec. 3. And be it further enacted, That every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

Sec. 4. And be it enacted and declared. That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Sec. 5. And be it further enacted, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such state or district, such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner as if the offence had been committed within the jurisdiction of the state or district to which he or they may belong, against a citizen or white inhabitant thereof.

Sec. 6. And be it further enacted, That for any of the crimes or offences aforesaid, the like proceedings shall be had for apprehending, imprisoning or bailing the offender, as the case

may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offences against the United States.

Sec. 7. And be it further enacted, That this act shall be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer.

APPROVED, July 22, 1790.

TRADE AND INTERCOURSE ACT OF 1793

An Act to regulate Trade and Intercourse with the Indian Tribes.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license under the hand and seal of the superintendent of the department, or of such other person, as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person so authorized shall, on application, issue such license for a term not exceeding two years, to any proper person, who shall enter into bond with one or more sureties approved of by the President of the United States, in the penal sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations, as the President of the United States shall prescribe.

Sec. 2. And be it further enacted, That the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds, as he may have taken, on the breach of any condition therein contained.

Sec. 3. And be it further enacted, That every person, who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession, as are usually vended to the Indians, without lawful

license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, in the Indian country, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days, at the discretion of the court, in which the trial shall be: Provided, That any citizen of the United States, merely travelling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

Sec. 4. And be it further enacted, That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any state, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such state or district, such offender shall be subject to the same punishment, as if the offence had been committed within the state or district, to which he or she may belong, against a citizen thereof.

Sec. 5. And be it further enacted, That if any such citizen or inhabitant shall make a settlement on lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum not exceeding one thousand dollars, nor less than one hundred dollars, and suffer imprisonment not exceeding twelve months, in the discretion of the court, before whom the trial shall be: And it shall, moreover be lawful for the President of the United States, to take such measures, as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon.

Sec. 6. And be it further enacted, That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this Act: Provided also, That every person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return, to the superintendent, or other person, from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses, by their color, height and other natural or artificial marks, under the penalties contained in their respective bonds. And every person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one hundred dollars, nor less than thirty dollars, to be recovered in any court of record having competent jurisdiction. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse: one half for the benefit of the informant, the other half for the use of the United States, to be recovered, as aforesaid.

Sec. 7. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person, offending herein, shall forfeit one thousand dollars, and be imprisoned, at the

discretion of the court, before which the conviction shall be had, not exceeding twelve months.

Sec. 8. And be it further enacted, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: Provided nevertheless, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 9. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and also to furnish them with goods or money, in such proportions, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: Provided, That the whole amount of such presents, and allowance to agents, shall not exceed twenty thousand dollars per annum.

Sec. 10. And be it further enacted, That the superior courts of each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with full power and authority, to hear and determine all crimes, offences and misdemeanors against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States, in their respective districts, shall have, and are hereby invested with like power to hear and determine the same.

Sec. 11. And be it further enacted, That it shall and may be lawful for the President of the United States, and for the governors of such territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said crimes, offences or misdemeanors, within any town, settlement or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases, where the punishment shall be death, it shall be lawful for the governor of the district, into which the offender may be first brought, or in which he may be apprehended, to issue a commission of oyer and terminer to the superior judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such districts have, in their ordinary sessions: And when the offender shall be

brought into, or shall be apprehended in any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any two judges of the supreme court of the United States, and the judge of the district, in which the offender may have been apprehended or first brought; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do.

Sec. 12. And be it further enacted, That all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half, to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case, the whole shall be to their use.

Sec. 13. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

Sec. 14. And be it further enacted, That all and every other act and acts coming within the purview of this act, shall be and are hereby repealed.

Sec. 15. And be it further enacted, That this act shall be in force, for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

APPROVED, March 1, 1793.

TRADE AND INTERCOURSE ACT OF 1796

An Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence down that branch, to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the Great Miami river, running into the Ohio, at, or near which fork, stood Laromie's store, and where commences the portage, between the Miami of the Ohio, and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; thence southwesterly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio, to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clark, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence easterly on the said ridge, to a point, from whence, a southwest line will strike the mouth of Duck river; thence still easterly on the said ridge, to a point forty miles above Nashville; thence northeast, to Cumberland river; thence up the said river, to where the Kentucky road crosses

the same; thence to the top of Cumberland mountain; thence along Campbell's line, to the river Clinch; thence down the said river, to a point from which a line shall pass the Holsten, at the ridge, which divides the waters running into Little River, from those running into the Tennessee; thence south, to the North Carolina boundary; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course, to Tugelo river; thence in a direct line, to the top of the Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's; Provided always, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

Sec. 2. And be it further enacted, That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Sec. 3. And be it further enacted, That if any such citizen, or other person, shall go into any country, which is allotted, or

secured by treaty as aforesaid to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person, as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned, not exceeding three months.

Sec. 4. And be it further enacted, That if any such citizen or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed: And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Sec. 5. And be it further enacted, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States,

to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States, to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make a settlement thereon: And every right, title, or claim forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender without any other or further proceeding.

Sec. 6. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Sec. 7. And be it further enacted, That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond, with one or more sureties, ap-

proved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes; and shall put in suit, such bonds as he may have taken, on the breach of any condition therein contained.

Sec. 8. And be it further enacted, That any such citizen or other person, who shall attempt to reside in any town, or hunting camp, of any of the Indian tribes, as a trader without such license, shall forfeit all the merchandise offered for sale, to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Sec. 9. And be it further enacted, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Sec. 10. And be it further enacted, That no such citizen or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act:

and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horse for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased, and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Sec. 11. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for, and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Sec. 12. And be it further enacted, That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian

nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 13. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Sec. 14. And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or across the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen, or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that

purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent, or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: And, in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured, and eventual indemnification: Provided always, that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: And provided also, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: And provided further, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen, or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Sec. 15. And be it further enacted, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States, of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial,

shall have, and are hereby invested with, full power and authority, to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts: And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding: And in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer, to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner, as the superior courts of such district have in their ordinary sessions: And when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States, to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district, in which such offender may have been apprehended, or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment, in the same manner, as the circuit courts of the United States.

Sec. 16. And be it further enacted, That it shall be lawful for the military force of the United States, to apprehend every person, who shall, or may be found in the Indian country, over and beyond the said boundary line, between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against, in due course of law: Provided, that no person, apprehended by military force, as aforesaid, shall be detained longer than ten days, after the arrest, and before removal.

Sec. 17. And be it further enacted, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Sec. 18. And be it further enacted, That the amount of fines, and duration of imprisonment, directed by this act as a punishment, for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be, one half to the use of the informant, and the other half to the use of the United States: Except where the prosecution shall be first instituted on behalf of the United States; in which case, the whole shall be to their use.

Sec. 19. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district; and of the navigation of the Tennessee river, as reserved and secured by treaty.

Sec. 20. And be it further enacted, That the President of the United States be, and he is hereby authorized, to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Sec. 21. And be it further enacted, That all and every other act and acts, coming within the purview of this act, shall be, and they are hereby repealed: Provided, nevertheless, that all disabilities, that have taken place, shall continue and remain; all penalties and forfeitures, that have been incurred, may be recovered; and all prosecutions and suits, that may have been commenced, may be prosecuted to final judgment, under the said act or acts, in the same manner, as if the said act or acts were continued, and in full force and virtue.

Sec. 22. And be it further enacted, That this act shall be in force, for the term of two years, and from thence to the end of the session of Congress next thereafter, and no longer.

APPROVED, May 19, 1796.

TRADE AND INTERCOURSE ACT OF 1799.

An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence, down that branch, to the crossing place above Fort Laurence; thence, westwardly to a fork of that branch of the Great Miami river running into the Ohio, at or near which fork stood Laromie's store, and where commences the portage, between the Miami of the Ohio and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westwardly course to Fort Recovery, which stands on a branch of the Wabash; thence southwardly, in a direct line to the Ohio, so as to intersect that river opposite the mouth of Kentucky or Cuttawa river; thence down

the said river Ohio, to the tract of one hundred and fifty thousand acres near the rapids of the Ohio, which has been assigned to General Clarke, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence southeastwardly on the said ridge, to a point, from whence a southwest line will strike the mouth of Duck river; thence still eastwardly on the said ridge, to a point forty miles above Nashville; thence northeast, to Cumberland river; thence up the said river, to where the Kentucky road crosses the same; thence to the Cumberland mountain, at the point of Campbell's line; thence in a southwestwardly direction along the foot of the Cumberland mountains, to Emory's river; thence down the same to its junction with the river Clinch; thence down the river Clinch to Hawkins's line; thence along the same to a white oak, marked one mile tree; thence south fifty-one degrees west, three hundred and twenty-eight chains to a large ash tree on the bank of the river Tennessee, one mile below southwest point; thence up the northeast margin of the river Tennessee (not including islands) to the Wild Cat Rock below Tellico block-house; thence in a direct line to the Militia spring near the Maryville road, leading from Tellico; thence from the said spring to the Chilhowee mountain, by a line so to be run, as will leave all the farms on Nine-mile creek to the northward and eastward of it, and to be continued along the Chilhowee mountain until it strikes Hawkins's line; thence along the said line to the Great Iron mountain; and from the top of which, a line to be continued in a southeastwardly course to where the most southern branch of Little river crosses the divisional line to Tugaloo river; thence along the South Carolina Indian boundary, to and over the Oconna mountain, in a southwest course to Tugaloo river; thence in a direct line to the top of Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee,

which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's: Provided always, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner, as said provisions apply by force of this act to the boundary line herein before recited.

Sec. 2. And be it further enacted, That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in anywise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Sec. 3. And be it further enacted, That if any such citizen, or other person, shall go into any country, which is allotted or secured by treaty, as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned not exceeding three months.

Sec. 4. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable if committed within the jurisdiction of any state, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such of-

fender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed. And if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Sec. 5. And be it further enacted, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars, and suffer imprisonment, not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make a settlement thereon. And every right, title, or claim forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender, without any other or further proceeding.

Sec. 6. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory

belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Sec. 7. And be it further enacted, That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes. And the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations, or restrictions, provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

Sec. 8. And be it further enacted, That any such citizen or other person, who shall attempt to reside in any town, or hunting camp, of any of the Indian tribes, as a trader, without such license, shall forfeit all the merchandise offered for sale, to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Sec. 9. And be it further enacted, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting

skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Sec. 10. And be it further enacted, That no such citizen, or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person, as the President shall appoint, is hereby authorized to grant on the same terms, conditions and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid; describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased, and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Sec. 11. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for, and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Sec. 12. And be it further enacted, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law

or equity, unless the same be made by treaty or convention, entered into, pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months: Provided, nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 13. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Sec. 14. And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that

purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury; and in the mean time, in respect to the property so taken, stolen, or destroyed, the United States guaranty to the party injured, an eventual indemnification: Provided always, that if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: And provided also, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: And provided further, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Sec. 15. And be it further enacted, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with full power and authority to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein, in the same manner, as if such crimes, offences and misdemeanors had

been committed within the bounds of their respective districts. And in all cases, where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding. And in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such district have in their ordinary sessions. And when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district in which such offender may have been apprehended or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner, as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment, in the same manner, as the circuit courts of the United States.

Sec. 16. And be it further enacted, That it shall be lawful for the military force of the United States, to apprehend every person who shall or may be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against in due course of law: Provided, that no person, apprehended by

military force, as aforesaid, shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers, who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person, while in custody, shall suffer such punishment as a court-martial shall direct. Provided, that the officer having custody of such person or persons shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any state, who, if the offence is bailable, shall take proper bail if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

Sec. 17. And be it further enacted, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose, and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Sec. 18. And be it further enacted, That the amount of fines, and duration of imprisonment, directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed in the discretion of the court, before whom the trial shall be had, and that all fines and forfeitures, which shall

accrue under this act, shall be one half to the use of the informant, and the other half to the use of the United States: except where the prosecution shall be first instituted on behalf of the United States; in which case, the whole shall be to their use.

Sec. 19. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement (so called) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said trace, after which, the penalties of this act shall be incurred by every person travelling or being found on said trace, within the Indian boundary without a passport.

Sec. 20. And be it further enacted, That the President of the United States be, and he is hereby authorized to cause to be clearly ascertained, and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Sec. 21. And be it further enacted, That this act shall be in force from and after the third day of March, one thousand seven hundred and ninety-nine, and shall continue in force the term of three years; and so far as respects the proceedings under this act, it is to be understood, that the act, intituled "An act to amend an act, intituled An act giving effect to the laws of the United States within the district of Tennessee," is not to operate. And all disabilities which have taken place shall continue and remain; and all penalties and forfeitures, that have been incurred, may be recovered, and all prosecution

and suits which may have been commenced, may be prosecuted to final judgment, under the act, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers; which act expires, by its own limitation, on the third day of March, one thousand seven hundred and ninety-nine, in the same manner, as if the said act was continued in force.

APPROVED, March 3, 1799.

TRADE AND INTERCOURSE ACT OF 1802.

An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in all such places as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on Lake Erie, and running thence up the same to the portage between that and the Tuscaroras branch of the Muskingum; thence, down that branch, to the crossing place above Fort Laurence; thence westwardly to a fork of that branch of the Great Miami river running into the Ohio, at or near which fork stood Laromie's store, and where commences the portage, between the Miami of the Ohio and St. Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westwardly course to Fort Recovery, which stands on a branch of the Wabash; thence southwestwardly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clarke, for the use of himself and his warriors; thence around the said tract, on the line of the said tract, till it shall again intersect the said river Ohio; thence down the same to a point

opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence southeastwardly on the said ridge, to a point, from whence a southwest line will strike the mouth of Duck river; thence, still eastwardly on the said ridge, to a point forty miles above Nashville; thence northeast to Cumberland river; thence up to the said river to where the Kentucky road crosses the same; thence to the Cumberland mountain, at the point of Campbell's line; thence in a southwestwardly direction along the foot of the Cumberland mountain to Emory's river; thence down the same as to its junction with the river Clinch; thence down the river Clinch to Hawkins's line; thence along the same to a white oak, marked one mile tree; thence south fifty-one degrees west, three hundred and twenty-eight chains, to a large ash tree on the bank of the river Tennessee, one mile below southwest point; thence up the northeast margin of the river Tennessee (not including islands) to the Wild Cat Rock, below Tellico block-house; thence in a direct line to the Militia spring, near the Maryville road leading from Tellico; thence from the said spring to the Chilhowee mountain by a line so to be run as will leave all the farms on Nine Mile creek to the northward and eastward of it, and to be continued along the Chilhowee mountain until it strikes Hawkins's line; thence along the said line to the great Iron mountain; and from the top of which a line to be continued in a southeastwardly course to where the most southern branch of Little river crosses the divisional line to Tugaloo river; thence along the South Carolina Indian boundary to and over the Oconna mountain, in a southwest course to Tugaloo river; thence in a direct line to the top of Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river St. Mary's: Provided always, that if the boundary line between the said Indian tribes and the United States shall, at any time hereafter, be varied, by any treaty

which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner as said provisions apply, by force of this act, to the boundary line herein before recited.

Sec. 2. And be it further enacted, That if any citizen of, or other person resident in, the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in any wise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

Sec. 3. And be it further enacted, That if any such citizen or other person, shall go into any country which is allotted, or secured by treaty as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the governor of some one of the United States, or the officer of the troops of the United States, commanding at the nearest post on the frontiers, or such other person as the President of the United States may, from time to time, authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned not exceeding three months.

Sec. 4. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any state, against a citizen of the United States: or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the prop-

erty so taken or destroyed: and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the treasury of the United States: Provided nevertheless, that no such Indian shall be entitled to any payment out of the treasury of the United States, for any such property taken or destroyed, if he or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

Sec. 5. And be it further enacted, That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment, not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary, to remove from lands; belonging or secured by treaty, as aforesaid, to any Indian tribe, any such citizen, or other person, who has made, or shall hereafter make, or attempt to make a settlement thereon.

Sec. 6. And be it further enacted, That if any such citizen, or other person, shall go into any town, settlement or territory belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians, belonging to any nation or tribe of Indians, in amity with the United States, such offender, on being thereof convicted, shall suffer death.

Sec. 7. And be it further enacted, That no such citizen, or other person, shall be permitted to reside at any of the towns, or hunting camps, of any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose: which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, to such trader, who shall enter into bond with one

or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions, as are, or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations, or restrictions, provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

Sec. 8. And be it further enacted, That any such citizen or other person, who shall attempt to reside in any town or hunting camp, of any of the Indian tribes, as a trader, without such license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

Sec. 9. And be it further enacted, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

Sec. 10. And be it further enacted, That no such citizen or other person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the

superintendent, or other person, from whom he obtained his license, of every horse purchased by him, as aforesaid: describing such horses, by their colour, height, and other natural or artificial marks, under the penalty contained in their respective bonds. And every such person, purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person, who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons, not licensed, as above, to purchase the same, shall forfeit the value of such horse.

Sec. 11. And be it further enacted, That no agent, superintendent, or other person authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse to or from any Indian, excepting for and on account of the United States; and any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

Sec. 12. And be it further enacted, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months; Provided nevertheless, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the

same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Sec. 13. And be it further enacted, That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States, to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: Provided, that the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

Sec. 14. And be it further enacted, That if any Indian or Indians, belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any state or territory inhabited by citizens of the United States, and there take, steal or destroy any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, then it shall be the duty of such superintendent or other person authorized as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: and in the mean time, in respect to the property so taken, stolen or destroyed, the United States guarantee to the

party injured, an eventual indemnification: Provided always, that if such injured party, his representative, attorney or agent, shall, in any way, violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States, for such indemnification: And provided also, that nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian having so offended: And provided further, that it shall be lawful for the President of the United States, to deduct such sum or sums, as shall be paid for the property taken, stolen or destroyed by any such Indian, out of the annual stipend, which the United States are bound to pay to the tribe, to which such Indian shall belong.

Sec. 15. And be it further enacted, That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with full power and authority to hear and determine all crimes, offences and misdemeanors, against this act; such courts proceeding therein in the same manner, as if such crimes, offences and misdemeanors had been committed within the bounds of their respective districts; and in all cases where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall have, and are hereby invested with like power to hear and determine the same, any law to the contrary notwithstanding: and in all cases, where the punishment shall be death, it shall be lawful for the governor of either of the territorial districts where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such districts have in their ordinary

sessions; and when the offender shall be apprehended, or brought for trial into any of the United States, except Kentucky or Tennessee, it shall be lawful for the President of the United States, to issue a like commission to any one or more judges of the supreme court of the United States, and the judge of the district in which such offender may have been apprehended or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases, as the circuit court of such district, and shall proceed to trial and judgment, in the same manner as such circuit court might or could do. And the district courts of Kentucky, Tennessee and Maine shall have jurisdiction of all crimes, offences and misdemeanors committed against this act, and shall proceed to trial and judgment in the same manner, as the circuit courts of the United States.

Sec. 16. And be it further enacted, That it shall be lawful for the military force of the United States to apprehend every person who shall, or may be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest, convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining states or districts, to be proceeded against in due course of law: Provided, that no person, apprehended by military force as aforesaid, shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person, while in custody, shall suffer such punishment as a court martial shall direct: Provided, that the officer having custody of such person or persons shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any state, who, if the offence is bailable, shall take proper bail if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby

authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

Sec. 17. And be it further enacted, That if any person, who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner, as if such crime or offence had been committed within such state or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate, or any proper officer, or other person duly authorized for that purpose and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized, as aforesaid, in arresting such offender, and him committing to safe custody, for trial according to law.

Sec. 18. And be it further enacted, That the amount of fines, and duration of imprisonment, directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court, before whom the trial shall be had; and that all fines and forfeitures, which shall accrue under this act, shall be one half to the use of the informant, and the other half to the use of the United States; except where the prosecution shall be first instituted on behalf of the United States; in which case the whole shall be to their use.

Sec. 19. And be it further enacted, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair the said road, under the direction or orders of the governor of said state, and

of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement, or to the settlement on Obed's river, (so called,) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said traces, or either of them, as the case may be, after which, the penalties of this act shall be incurred by every person travelling or being found on said traces, or either of them, to which the prohibition may apply, within the Indian boundary, without a passport.

Sec. 20. And be it further enacted, That the President of the United States be, and he is hereby authorized to cause to be clearly ascertained and distinctly marked, in all such places as he shall deem necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe, which now are, or hereafter may be established by treaty.

Sec. 21. And be it further enacted, That the President of the United States be authorized to take such measures, from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes, any thing herein contained to the contrary thereof notwithstanding.

Sec. 22. And be it further enacted, That this act shall be in force from the passage thereof; and so far as respects the proceedings under this act, it is to be understood, that the act, intituled "An act to amend an act, intituled An act giving effect to the laws of the United States within the district of Tennessee," is not to operate.

APPROVED, March 30, 1802.

TITLE 25, UNITED STATES CODE § 177

§ 177. Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

§ 180. Settling on or surveying lands belonging to Indians by treaty

Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of \$1,000. The President may, moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands.

TITLE 28, UNITED STATES CODE § 2415

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable

administrative proceedings required by contract or by law, whichever is later: Provided, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment: Provided further, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: Provided further, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed sixty days after the date of publication of the list required by section 4(c) of the Indian Claims Act of 1982: Provided, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the date the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: Provided, That an action to recover damages resulting from a trespass on lands of the United States:

an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought on or before sixty days after the date of the publication of the list required by section 4(c) of the Indian Claims Act of 1982: Provided, That, for those claims that are on either of the two lists published pursuant to the Indian Claims Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim or (2) three years after the Secretary of the Interior has submitted legislation or legislative report to Congress to resolve such claim.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

. . .

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

. . .

TREATY OF CANANDAIGUA, NOVEMBER 11, 1794,
7 STAT. 44

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

Article I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

Article II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

. . .

Article IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor even disturb the people of the United States in the free use and enjoyment thereof.

. . .

Article VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations: and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers,

who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

Article VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four. [There follows a series of signatures.]

TREATY OF SEPTEMBER 15, 1795

This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread; Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attornies authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part:

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto

the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid, and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at

the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

WHEREAS Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz: Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North

one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said

State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained n the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith or part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

[There follows a series of signatures.]

TREATY OF JUNE 1, 1798

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York

The said Indians having in the month of March last Proposed to the Goveronor [sic] of the said State to cede the Lands herein after described, for the compensation herein after mentioned — and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Newageghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation — And also the same Breadth for the distance of three miles

on the south side and of one mile on the north side of the said Road Eastward to commence at the Eastern Boundary of the said Lot No. 54, Provided and excepted nevertheless that the following Indian Families Viz: Sarah Docksteder, Jacob Docksteder, Cornelius Docksteder Lewis Denny John Denny, Jan Joost and Nicholas shall be suffered to possess of the Tract First above mentioned. The Grounds cultivated by them respectively and their improvements not exceeding Fifty Acres to each Family so long as they shall reside there — And in consideration of this Proviso and Exception the said Indians do further Cede that a tract of Twelve Hundred and Eighty Acres, as Follows— that is to say Beginning in the South east Corner of Lot No. 59, in the said last Purchase and running thence East one Mile, thence North two Miles thence West One Mile and thence South Two Miles shall be considered as set Apart by the said Nation or Tribe for the use of the said Families whenever they shall remove from where they now reside, The Said Agents do for the People of the said State pay to the said Indians in addition to the said sum of Three Hundred dollars already advanced to them as above mentioned the further sum of Two Hundred Dollars, And do grant to the said Indians that the People of the said State shall pay to the said Indians at their said Village on the First day of June next and on the first day of June Yearly thereafter the Annual Sum of Seven Hundred Dollars.

In Testimony whereof the said Commissioner, the said Agents and the said Indians have hereunto and to other Acts of the same Tenor and date the One to remain with the United States another to remain with the State of New York and another to remain with the said Indians set their hands and Seals at the Village Aforesaid the Day and Year first above written.

[There follows a series of signatures.]

TREATY OF JUNE 4, 1802

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York, on the fourth day of June in the year of our Lord One Thousand eight Hundred and Two

Present John Tayler Agent appointed under the authority of the United States to hold the Treaty, and Ezra L'Hommedieu and Simeon DeWitt Agents for the State of New York.

The said Indians having by their Sachems Chiefs and Warriors in the month of March last proposed to the Governor of the said State to cede the Lands hereinafter described for the compensation hereinafter mentioned And the said Governor together with the Surveyor General of the said State and Ezra L'Hommedieu Esquire an Agent appointed by the said Governor pursuant to concurrent resolutions of the Senate and Assembly of the State bearing date the 23d and 24 days of February last, having acceded to the proposal of the said Sachems Chiefs and Warriors, and on the fifth day of the said month of March executed a provisional agreement with them for the cession and purchase of the same, and advanced to them at their desire in part payment of the said Compensation three Hundred dollars, to answer the immediate Occasions of the said Indians — The said Cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty which hath on the request of the said Governor been appointed to be held for the purpose, as follows, that is to say, The said Indians do Cede release and quit claim to the people of the State of New York forever the several Tracts or parcels of Land hereinafter described, being parts of the lands heretofore reserved to the said Oneida Nation of Indians To wit, All that certain Tract of Land beginning at the Southwest corner of the Land lying along the Genesee Road, and which was ceded in the year One thousand Seven hundred

and Ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned Tract, easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York then along the same westerly to a part of said last mentioned Land called the Two-mile strip, and then along the same northerly to the place of Beginning — Also, another Tract of Land bounded on the south by the Genesee Road, on the North by a Line drawn parallel to said Road — and at the Distance on an average of half a mile to the northward thereof, and extending from the West bounds of a tract of One hundred Acres now ceded and including Myndert Van Eps Wemples house westerly to the Lands heretofore ceded as aforesaid. Provided that the north bounds of the last described tract shall be run with such right Angular offsets as to leave the Indian Houses near the northwesterly corner of said Tract, Twenty chains distant from the same — Also, One Hundred Acres to be laid out in a square and to extend each way from the house of said Myndert Van Eps Wemple along the said Genesee Road fifteen chains and northerly from said Road fourteen chains and Southerly from said road twenty chains Also all that part of the land heretofore reserved by the said Oneida nation of Indians along the Fish Creek which lies to the northward of the Bridge over said Creek commonly called and known by the name of Bloomfields Bridge. The said Agents do for the people of the State of New York in conformity to the said provisional agreement pay to the said Indians in addition to the said sum of Three Hundred Dollars already advanced to them as above mentioned the further sum of Six Hundred Dollars, and do grant to the said Indians that the People of the said State shall annually forever hereafter on such day and place as are or shall be appointed for the Pay-

ment of other Annuities to the said Indians pay to the said Indians the sum of Three hundred Dollars. And the said Agents do further grant to the said Indians that the People of the State of New York, out of the lands above described and hereby ceded to them shall grant to Sarah Docksteder One Hundred Acres to be laid out in a square adjoining the Two-Mile Tract, on the Road commonly called Klocks, Road, as the said One Hundred Acres shall be laid out by order of the Surveyor General with the approbation of the said Sarah, to be held to her during her natural life and thereafter to her heirs in fee. And ALSO to Michael Kern One Hundred and fifty Acres, so as to include the House in which he now resides with the other improvements made by him around the Same.

In Testimony whereof the said commissioner the said Agents and the said Indians have hereunto and to other Acts of the same tenor and date the one to remain with the United States another to remain with the State of New York and another to remain with the said Indians, set their hands and seals at the Village aforesaid the day and year first above written.

[There follows a series of signatures.]